Supreme Court, U.S.
FILED
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CLERK

No. 01-463

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

FIOR D'ITALIA, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: SEPT. 14, 2001
CERTIORARI GRANTED: JAN. 7, 2002

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TAB A

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA (S.F.)

No. 97-CV-4613

FIOR D'ITALIA, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
12/18/97	1	COMPLAINT (Summons Issued); Fee status paid entered on 12/18/97 in the amount of $150.00 (Receipt No. 129782) [3:97-cv-04613] (tn) [Entry date 12/23/97]
12/18/97	2	ORDER by Judge Charles A. Legge setting status conference for 11:00 a.m. on 4/3/98 (cc: all counsel) [3:97-cv-04613] (tn) [Entry date 12/23/97]
1/13/98	3	RETURN OF SERVICE executed upon the U.S. Attorney General and the U.S. Attorney's Office for the Northern Dist. Of CA on

DATE	DOCKET NUMBER	PROCEEDINGS
		behalf of defendant USA served by certified mail on 1/12/98 [3:97-cv-04613] (tn) [Entry date 01/15/98]
3/26/98	4	CASE MANAGEMENT STATEMENT and PROPOSED ORDER filed by defendant [3:97-cv-04613] (tn) [Entry date 03/27/98]
4/3/98	5	MINUTES: (C/R Not Reported) Hearing Date 4/3/98) Case management conference - held, the United States needs to get authority for a counterclaim, and is currently waiting to receive it, matter was continued to 5/29/98 at 9:30 a.m. for cross-motion for summary judgment (4/24/98 - plaintiff's motion, 5/8/98- Gov't. opposition/ cross-motion for summary judgment & reply due 8/15/98 [3:97-cv-04613] (tn) [Entry date 04/07/98]

DATE	DOCKET NUMBER	PROCEEDINGS
4/28/98	6	ANSWER by defendant to plaintiff's complaint [1-1] [3:97-cv-04613] (tn) [Entry date 05/04/98]
4/28/98	6	COUNTERCLAIM by defendant against Plaintiff [3:97-cv-04613 (tn) [Entry date 05/04/98]
4/28/98	—	SUMMONS on a counterclaim issued as to Counterdefendant Fior D'Italia, Inc. [3:97-cv-04613] (tn) [Entry date 05/04/98]
5/6/98	7	STIPULATION and ORDER by Judge Charles A. Legge: extending time for plaintiff to 05/15/98 to file its motion for summary judgment, All motions will be heard by 9:30 6/19/98; (cc: all counsel) [3:97-cv-04614] (rs) [Entry date 05/14/98]
5/18/98	—	RECEIVED Proposed Order by Plaintiff Fior D'Italia, Inc. for attorney Tracy Power to appear Pro Hac Vice [3:97-cv-04613] (awb)

DATE	DOCKET NUMBER	PROCEEDINGS
5/18/98	8	NOTICE OF MOTION AND MOTION by Plaintiff Fior D'Italia, Inc. for summary judgment and brief in support thereof; Motion to be heard 6/19/98 at 9:30 before the Honorable Charles Legge [3:97-cv-04613] (awb)
5/18/98	—	RECEIVED Proposed Order by Plaintiff Fior D'Italia, Inc. re: motion for summary judgment [8-1] [3:97-cv-04613] (awb)
5/19/98	9	APPLICATION before Judge Charles A. Legge by Plaintiff for attorney Tracy J. Power to appear pro hac vice [3:97-cv-04613] (tn)
5/19/98	9	ORDER by Judge Charles A. Legge granting plaintiff's application for attorney Tracy J. Power to appear pro hac vice [9-1] (cc: all counsel) [3:97-cv-04613] (tn)
5/19/98	10	LETTER dated 5/15/98 from Tracy J. Power to Clerk regarding filing of affidavit of James M. Bril [3:97-cv-04613] (tn)

DATE	DOCKET NUMBER	PROCEEDINGS
5/19/98	11	AFFIDAVIT of James M. Bril on behalf of plaintiff [3:97-cv-04613] (tn)
5/20/98	12	REPLY/ANSWER TO COUNTERCLAIM [6-1] by Plaintiff & Counter-defendant Fior D'Italia, Inc. [3:97-cv-04613] (tn)
5/29/98	13	CROSS-MOTION by defendant for summary judgment, with Notice set for 9:30 a.m. on 6/19/98 [3:97-cv-04613] (tn) [Entry date 06/02/98]
5/29/98	13	MEMORANDUM by defendant in opposition to plaintiff's motion for summary judgment [8-1], and in support of its cross-motion for summary judgment [3:97-cv-04613] (tn) [Entry date 06/02/98]
5/29/98	14	DECLARATION of Thomas Moore on behalf of defendant re opposition memorandum [13-1], re cross-motion for summary judgment [3-1] [3:97-cv-04613] (tn) [Entry date 06/02/98]

DATE	DOCKET NUMBER	PROCEEDINGS
6/8/98	15	RESPONSE (Brief) by Plaintiff Fior D'Italia, Inc. in opposition to defts' motion for summary judgment [13-1] [3:97-cv-04613] (awb) [Entry date 06/10/98]
6/19/98	16	MINUTES: (C/R Kathy Wyatt) (Hearing Date: 6/19/98) that the cross-motion for summary judgment [13-1] is submitted; the court will issue a written opinion [3:97-cv-04613] (tn) [Entry date 06/22/98]
9/18/98	17	OPINION AND ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT by Judge Charles A. Legge denying defendant's cross-motion for summary judgment [3-1], and granting plaintiff's motion for summary judgment [8-1]; however, further procedures are necessary to establish the amount of the tax refund that is due to plaintiff, and status conference set for 11:00 a.m. on 10/30/98 to

DATE	DOCKET NUMBER	PROCEEDINGS
		schedule those procedures (Date Entered: 9/23/98) (cc: all counsel) [3:97-cv-04613] (tn) [Entry date 09/23/98]
10/26/98	18	NOTICE OF EXPEDITED MOTION before Judge Charles A. Legge by defendant for leave to file motion to reconsider with Notice set for 9:30 a.m. on 10/30/98 [3:97-cv-04613] (tn)
10/28/98	19	EXPEDITED MOTION by Judge Charles A. Legge by Plaintiff to postpone status conference until the court rules on defendant's expedited motion for leave to file motion for reconsideration [3:97-cv-04613] (tn)
10/28/98	20	OPPOSITION by Plaintiff to defendant's motion for leave to file motion to reconsider [18-1] [3:97-cv-04613] (tn)

DATE	DOCKET NUMBER	PROCEEDINGS
11/13/98	—	ORDER by Judge Charles A. Legge granting defendant's motion for leave to file motion to reconsider [18-1]. Defendant may file motion for reconsideration, and a brief in support of it, by 11/30/98. Plaintiff may file a reply by 12/15/98. The motion and the reply must be limited to the effect of the Federal Circuit's decision on the reasoning of this court's opinion and order of 9/18/98 (cc: all counsel) [3:97-cv-04613] (tn) [Entry date 11/18/98]
11/30/98	22	MOTION WITH MEMORANDUM OF LAW before Judge Charles A. Legge by defendant for reconsideration [3:97-cv-04613] (tn)
12/15/98	23	OPPOSITION by Plaintiff to defendant's motion for reconsideration [22-1], and memorandum of law in support thereof [3:97-cv-04613] (tn) [Entry date 12/24/98]

DATE	DOCKET NUMBER	PROCEEDINGS
2/23/99	24	ORDER by Judge Charles A. Legge DENYING defendant's motion for reconsideration [22-1], and status conference set for 11:00 a.m. on 3/12/99 (Date Entered: 2/26/99) (cc: all counsel) [3:97-cv-04613] (tn) [Entry date 02/26/99]
3/8/99	25	STIPULATION and ORDER by Judge Charles A. Legge: that judgment is entered against the United States of America and in favor of plaintiff for the 1994 Tax year for form 941 employment taxes in the amount of $18.34 together with interest thereon at the lawful rate prescribed by 28 U.S.C. Section 1961(c)(1) from 2/1/95 until paid, and terminating case [Date Entered: 3/15/99] (cc: all counsel)

DATE	DOCKET NUMBER	PROCEEDINGS
5/7/99	26	NOTICE OF APPEAL by defendant USA from Dist. Court decision order [25-2], [24-2] & [17-2]; Fee status waive/government [3:97-cv-04613 (tn) [Entry date 05/11/99]
5/7/99	—	RECEIVED Civil Appeals Docketing Statement submitted by defendant USA re: appeal [26-1] [document forwarded to USCA] [3:97-cv-04613] (tn) [Entry date 5/11/99]
5/7/99	27	TRANSCRIPT DESIGNATION and Ordering Form filed by defendant USA – not designating any portion of the transcript; C/R: None; appeal [26-1] [3:97-cv-04613] (tn) [Entry date 05/11/99]
6/1/99	–	NOTIFICATION by Circuit Court of Appellate Docket Number 99-16021 [3:97-cv-04613] (tn) [Entry date 06/02/99]

TAB B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-16021

FIOR D'ITALIA, INC.,
PLAINTIFF-COUNTER-DEFENDANT-APPELLEE

v.

UNITED STATES OF AMERICA,
DEFENDANT-COUNTER-CLAIMANT-APPELLANT

DOCKET ENTRIES

DATE	PROCEEDINGS
5/24/99	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): NO Setting schedule as follows: appellant's designation of RT is due 5/17/99; appellee's designation of RT is due 5/27/99; appellant shall order transcript by 6/7/99; court reporter shall file transcript in DC by 7/7/99; certificate of record shall be filed by 7/14/99; appellant's opening brief is due 8/23/99; appellees' brief is due 9/22/99; appellants' reply brief is due 10/6/99; [99-16021] (sm)

DATE	PROCEEDINGS
5/24/99	Filed Gary R. Allen for Appellant USA Civil Appeals Docketing Statement served on 5/7/99 (to CONFATT) [99-16021] [99-16021] (sm)
6/7/99	Rec'd ntc of appearance of Jeffrey R. Meyer as csl for USA; served on 6/3/99. [99-16021] (jr)
6/23/99	Case rejected from Circuit Mediation Program. (ah)
8/26/99	Filed original and 15 copies aplt's opening brf (Informal: no) of 44 pages and five excerpts of record in 1 volume; served on 8/23/99. [99-16021] (jr)
9/23/99	Filed original and 15 copies aple's 41 page brf; served on 9/22/99. [99-16021] (jr)
10/1/99	Rec'd Amicus Nat'l Restaurant's brf in 15 copies of 27 pages; served on 9/29/99 to (PRO MO w/motion to file).[99-16021] (jr)
10/6/99	Filed motion of Nat'l Restaurant Assoc's for leave to file brf as amicus curiae and deputy clerk order (Deputy Clerk: tah/PRO MO) the motion and any future related filings shall be referred for disposition to the panel that considers

DATE	PROCEEDINGS
	the merits of the case. [3766833-1] Copies of the proffered brf shall be provided to the panel to aid resolution of the motion. Any further request to file friend of the court brfs shall be treated in the same fashion. Aplt shall monitor the issuance of the cor. (Motion recvd 10/1/99) [99-16021] (jr)
10/7/99	14 day oral extension by phone of time to file['s] reply brief. [99-16021] appellants' reply brief due 10/25/99; (king)
10/18/99	Filed certificate of record or appeal RT filed in DC N/T [99-16021] (cha)
10/29/99	Filed original and 15 copies aplt's rpy brf (Informal: no) of 27 pages; served on 10/26/99. [99-16021] (jr)
12/27/99	Calendar check performed [99-16021] (rei)
1/13/00	Calendar materials being prepared. [99-16021] [99-16021] (aw)
1/20/00	CALENDARED: SAN FRAN Mar. 15 2000 9:00 am Courtroom 3 * * 1:30 pm BERKELEY Boalt Hall ** [99-16021] (aw)

DATE	PROCEEDINGS
2/23/00	Filed order (Deputy Clerk: gb) Nat'l Restaurant Assoc's motion to file an amicus curiae brf is GRANTED. [3766833-1] [99-16021] (jr)
2/23/00	Filed original and 15 copies Nat'l Restaurant's amicus brf of 27 pages; served on 9/29/99. [99-16021] (jr)
2/28/00	Rec'd USA's addl authority; served on 2/23/00 to (PANEL). [99-16021] (jr)
3/9/00	Rec'd aple's ltr of addl citations; served on 3/8/00 (FED EXED TO PANEL). [99-16021] (jr)
3/15/00	ARGUED AND SUBMITTED TO Alex KOZINSKI, Andrew J. KLEINFELD, M. M. MCKEOWN. [99-16021] (dl)
3/22/00	Rec'd aple's ltr dated 3/21/00 re: inquiries brought up during oral argument to (PANEL). [99-16021] (jr)
4/11/00	Received Jeffrey R. Meyer for Appellant USA letter dated 04/04/00 re: in response to appellees' letter dated 03/21/00 (PANEL) [99-16021] (sm)
5/8/00	Rec'd aplt's ltr dated 5/2/00 as addendum to ltr dated 3/21/00; served on 5/2/00 to PANEL). [99-16021] (jr)

DATE	PROCEEDINGS
6/26/00	Rec'd USA's ltr of addl authority; served on 6/21/00 to (PANEL). [99-16021] (jr)
3/7/01	FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed, Written, Signed, Published. Alex KOZINSKI, author; Andrew J. KLEINFELD; M. M. MCKEOWN, dissenting) FILED AND ENTERED JUDGMENT. [99-16021] (jr)
4/23/01	[4150207] Filed original and 50 copies aplt's petition for rehearing with suggestion for rehearing en banc 18 pages; served on 4/20/01 to (PANEL & ALL ACTIVE JUDGES). [99-16021] (jr)
5/18/01	Filed order (Alex KOZINSKI, Andrew J. KLEINFELD & M.M. MCKEOWN) the petition for rehearing is denied. [4150207-1] [99-16021] (jr)
5/30/01	MANDATE ISSUED [99-16021] (jr)
8/6/01	Rec'd ltr from the Supreme Court dated 8/3/01 re: extension granted to and including 9/15/01 in which to file cert petition. [99-16021] (jr)
9/27/01	Rec'd ntc from Supreme Court; petition for certiorari filed. Supreme Court No. 01-463; filed on 9/14/01 & placed on dkt 9/17/01. [99-16021] (jr)

DATE	PROCEEDINGS
1/22/02	Rec'd ltr from the Supreme Court dated 1/11/02 re: order entered 1/11/02 granting petition for writ of certiorari. Petitioner's brf is to be filed and served on or before 3 p.m. 2/25/02. Respondent's brf to be filed with the clk on or before 3 p.m. 3/27/02. Rpy brf, if any, to be filed with the clk on or before 4/15/02. Rule 29.2 is suspened. [99-16021] (jr)

TAB C

[Names Omitted]

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CIVIL ACTION NO. C-97-4613

FIOR D'ITALIA, INC., PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

[Filed: Dec. 18, 1997]

COMPLAINT FOR REFUND OF TAXES PAID AND ABATEMENT OF TAXES ASSESSED

Plaintiff, Fior d'italia, Inc, by its attorneys, for its complaint alleges as follows:

1. Plaintiff is a corporation duly incorporated in the state of California with its principal place of business at 601 Union Street, San Francisco, California 94133.

2. Defendant is the United States of America.

3. This Court has jurisdiction over the subject matter of this complaint pursuant to the following statutory provisions:

(a) 28 U.S.C. 1331 (Judicial Code, federal question jurisdiction);

(b) 28 U.S.C. 1340 (Judicial Code jurisdiction concerning internal revenue laws);

(c) 28 U.S.C. 1346(a)(1) (Judicial Code jurisdiction concerning the recovery of erroneously or illegally assessed or collected internal revenue taxes); and

(d) 26 U.S.C. 7422 (Internal Revenue Code jurisdiction for civil action for refund).

Venue is predicted upon 28 U.S.C. 1391(e)(1992) and on 28 U.S.C. 1402(a)(2)(1982).

4. Plaintiff brings this action for the recovery of Federal Insurance Contribution Act (hereinafter "FICA") taxes illegally and erroneously assessed against and collected from Plaintiff on unreported tips of Plaintiff's employees in the aggregate as estimated by the Internal Revenue Service (hereinafter "IRS") for the years 1991 and 1992, under color of the Internal Revenue Law of the United States, specifically 26 U.S.C. 3121(q).

5. Plaintiff is primarily engaged in the business of preparing, processing and/or serving foodstuffs for immediate sale and consumption by the consumer on the premises through its restaurant operation. The restaurant is a large food and beverage establishment within the meaning of the Internal Revenue Code (hereinafter "IRC") § 6053(c) and the regulations thereunder, employs more than 10 employees on a typical business day, and tipping is customary within the restaurant.

6. Plaintiff receives, records, withholds, and pays the employer share of FICA taxes on the basis of all tips reported by employees in accordance with the law,

IRC §§ 3102, 3111, 3401, 6051, and 6053. In addition, Plaintiff timely files Form 8027, Employer's Annual Information Return of Tip Income and Allocated Tips, on an annual basis.

7. By letter dated December 19, 1994, IRS served Notice and Demand on Taxpayer employer for employer taxes on under reported tips as determined by IRS, purportedly pursuant to IRC Section 3121(q).

8. The amount of the assessment for the employer's share of unpaid FICA taxes on unreported tips was computed almost entirely on the basis of information filed by Plaintiff on Form 8027, using what is referred to by IRS as the "McQuatters Formula", which is derived from the case of *McQuatters v. Commissioner*, 32 CCH Tax Ct. Mem. 1122, 42 P-H Tax Ct. Mem. 1078 (1973).

9. Under the "MaQuatters Forluma," as utilized here, the charge tip rate was first determined on the basis of the total charged tips and charged sales reported on the Form 8027. This rate was then multiplied by the gross receipts as set forth on Form 8027 to determine the aggregate amount of tips received. Unreported tips are then determined by subtracting reported tips from the total tips estimated to have been received. The alleged unreported tips are then subjected to the FICA tax rate of 7.65% to determine the employer's FICA tax adjustment.

10. IRS determined, using this method, that Plaintiff owed additional unpaid FICA taxes of $11,976.00, on unreported tips allegedly received in 1991 and additional un paid FICA taxes of $11,286.00 on unreported tips allegedly received in 1992. IRS served Notice and Demand for these amounts by letter dated December

19, 1994, with a request that the amount be included on line 9 of the current quarter Form 941 filing due on January 31, 1995.

11. There was no attempt to apportion the taxes assessed among tipped employees, nor to credit the earnings of such employees with such tip income. Rather, the assessment was made on an aggregate basis against the gross earning of the restaurant, as shown in the attachments to the Notice and Demand letters, with instruction to pay the amount assessment in lump sum as an addition to taxes computed by the employer for the Form 941 due January 31, 1995.

12. In the case of an assessment for employer FICA taxes on aggregate unreported tips of all employees collectively without a determination of individual earnings it is impossible for individual W-2Cs reflecting the additional amount of tip earnings to be prepared by the employer. Since the Social Security Administration (SSA) uses such documents exclusively for purposes of crediting individual employees' wage earning history, no wage earnings history can ever be credit for such employees *even though the employees have honestly reported and paid their share of FICA taxes on such amounts.*

13. IRS's aggregate collection method results in a denial of social security earnings histories and corresponding social security benefits for those identified employees who actually *do* report the additional tip income to IRS and *do* pay the employee share of FICA Taxes on tips which they have not reported to their employer. If an employee declares the tip income on his income tax return and pays the resulting FICA taxes on such declared income, SSA will not credit that unreported tip income to that employee's earning

history until both employer and employee shares of FICA taxes on such unreported tips have been collected.

14. Plaintiff did not pay nor include the full amount of the taxes assessment on the December 31, 1994 Form 941 due January 31, 1995. Rather, Plaintiff included $18.36 on line 9 of the December 30, 1994 Form 941 due January 31, 1995 representing a partial payment under protest of the entire amount assessed for employer share of FICA taxes on under reported tips as provided for by *Flora* v. *United States*, 362 U.S. 145 (1960) and *Steele* v. *United States*, 280 F.2d 89 (8th Cir., 1960). The amount paid represents Plaintiff's calculation of the portion of the IRS assessment attributable to the imposition of employer share of FICA taxes under circumstances where clearly no FICA taxes would be due; to wit, where tip income is exempt from the definition of wages subject to the tax under I.R.C. § 3121(a)(12), where individual employees have reported well in excess of the average tip rate for the unit as determined by IRS using the "McQuatters Formula," and where tips were paid over to indirectly tipped employees, since there is no rational basis for using factors approved by the court in the *McQuatters* case, or any other case, to estimate tip income paid to indirectly tipped employees.

15. On February 20, 1995, Plaintiff filed a claim for a refund of the $18.36 partial payment made by the Plaintiff and an abatement of the full amount of the taxes, $23,262.00, assessed pursuant to the December 19, 1994 Notice and Demand. (See Form 843 with accompanying statement, attached hereto, as Exhibit A, and made apart hereof).

16. This suit for recovery of said amounts collected and assessed is brought on the same grounds or reasons as those set out in said claim for refund attached as Exhibit A.

17. The taxes wrongfully assessed and exacted from Plaintiff are predicated on the contention by the Commissioner of Internal Revenue and his representatives that § 3121(q) provides the Internal Revenue Service with the authority to assess FICA taxes against an *employer only* without any determination that the individual reports by employees pursuant to § 6053(a) were inaccurate or incomplete and without any attempt to credit the earnings of employees for Social Security benefits purposes with the additional tip income serving as the basis of the assessment against the employer. IRS further contends that IRC § 446 provides it with the authority to adjust the *employer's* FICA returns because the *employee* tip reports upon which the employer is statutorily permitted to rely may be inaccurate. IRS also apparently believes that such adjustment may be calculated on an aggregate rather than an individual employee-by-employee basis, using the "McQuatters Formula" case.

18. The collection and assessment of the FICA taxes herein described is illegal and erroneous for a number of reasons, but primarily because:

(a) Assessment of an employer share of FICA taxes on unreported tips with no Social Security benefit to the employees if such employer who allegedly received the tips is clearly contrary to the express Congressional purpose of the Social Security Act to provide old age and disability benefits based upon earnings credited for benefit purposes,

specifically contrary to the legislative purpose of Section 3121(q) to subject employers to tax on all tips which are credited for benefit purposes; and, in the requirement that only one type of employer pay an exaction for which its employees have no possibility of receiving intended benefits, is a violation of the Due Process, Equal Protection, and Just Compensation guarantees of the Fifth Amendment of United States Constitution;

(b) The "McQuatters Formula" is inappropriate as applied solely to the employer share of FICA taxes on estimated unreported tips in the absence of evidence that individual reports by employees were inaccurate or non-existent; and

(c) IRS's assessment based upon an average tip rate, calculated using the "McQuatters Formula" and applied across the board to all employees of a restaurant unit, effectively imposes a tax in circumstances where no tax would be due, e.g. where individual employee annual income exceed the maximum amounts upon which employment taxes are due; the tipped income of an individual employee was less than $20.00 for any one month; or the amount of tipped income retained by an individual employee was less than the average tip rate as calculated by IRS.

19. Neither the Secretary of Treasury nor his delegate, the District Director of Internal Revenue, has rendered a decision on said claim for refund. The statutory period of six months from the date of the filing of the claim for refund here involved, during which the Plaintiff is prohibited from bringing any suit or proceeding for the recovery of the taxes and

liabilities herein sought to be refunded, has expired and Plaintiff may now properly bring this suit (IRC § 6532(a)(1)).

WHEREFORE, Plaintiff, Fior d'Italia, Inc. demands judgement against Defendant in the amount of $18.36 plus interest thereon from January 31, 1995 to present; judgment ordering Defendant to abate any and all taxes assessed pursuant to 26 U.S.C. 6404 (1988); and, such further relief to which Plaintiff may be entitled, including but not limited to any costs and fees as provided under 26 U.S.C. 7430, together with any other costs and interest as provided by law.

Respectfully Submitted,

RICHARD L. DAVIS
Co-Counsel for Plaintiff

Dated: December 17, 1997 /s/ RICHARD L. DAVIS,

RICHARD L. DAVIS
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TAB D

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

No. C-97-4613-CAL

FIOR D'ITALIA, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA,
DEFENDANT AND COUNTERCLAIMANT

v.

FIOR D'ITALIA, INC., COUNTERCLAIM DEFENDANT

[Filed: Apr. 28, 1998]

ANSWER AND COUNTERCLAIM OF THE UNITED STATES

COMES NOW the defendant **United States of America** by and through its counsel of record, Michael J. Yamaguchi, United Stated Attorney for the Northern District of California, Jay R. Weill, Assistant United States Attorney, Chief, Tax Division, and Thomas Moore, Assistant United States Attorney, Tax Division, and for its answer to plaintiff's complaint, admits, denies and alleges as follows:

Denies each and every allegation of such complaint not admitted, qualified or otherwise specifically referred to below:

Furthering answering, the defendant United States of America says that:

1. Admits the allegations contained in paragraph 1 of the complaint.

2. Admits the allegations contained in paragraph 2 of the complaint.

3. Admits the allegations contained in paragraph 3 of the complaint.

4. Admits the allegations contained in paragraph 4 of the complaint, except denies taxes were illegally assessed or collected.

5. Admits the allegations contained in paragraph 5 of the complaint.

6. Denies the allegations contained in paragraph 6 of the complaint for lack of knowledge or information to sufficient to form a belief as to the truth of the allegations contained therein.

7. Admits the allegations contained in paragraph 7 of the complaint.

8. Denies the allegations contained in paragraph 8 of the complaint.

9. Admits the allegations contained in paragraph 9 of the complaint.

10. Admits the allegations contained in paragraph 10 of the complaint.

11. Denies the allegations contained in the first sentence of paragraph 11 of the complaint for lack of knowledge or information to sufficient to form a belief as to the truth of the allegations contained therein. Denies the allegations contained in the second sentence of the complaint.

12. To the extent Rule 8 requires a response to allegations contained in paragraph 12, the United States denies such allegations.

13. To the extent Rule 8 requires a response to allegations contained in paragraph 13, the United States denies such allegations.

14. Denies the allegations contained in paragraph 14 of the complaint for lack of knowledge or information to sufficient to form a belief as to the truth of the allegations contained therein.

15. Admits the allegations contained in paragraph 15 of the complaint.

16. Admits the allegations contained in paragraph 16 of the complaint.

17. To the extent Rule 8 requires a response to allegations contained in paragraph 17, the United States denies such allegations.

18. To the extent Rule 8 requires a response to allegations contained in paragraph 18, the United States denies such allegations.

19. Denies the allegations contained in paragraph 19 of the complaint for lack of knowledge or information to sufficient to form a belief as to the truth of the allegations contained therein. Continuing, defendant United States of America for is

COUNTERCLAIM AGAINST PLAINTIFF FIOR D'ITALIA

alleges as follows:

20. This counterclaim is made against Fior d'Italia, Inc., as a counterclaim defendant, pursuant to Rule 13 of the Federal Rules of Civil Procedure, to reduce to

judgment and collect from Fior d'Italia assessed but unpaid internal revenue taxes, penalties and interest owed to the counterclaim plaintiff United States for which counterclaim defendant Fior d'Italia is liable under Section 3121(q) of the Internal Revenue Code.

21. This counterclaim is directed by the Attorney General of the United States of America and is authorized by the Secretary of the Treasury or his delegate pursuant to 26 U.S.C. § 7401.

22. Jurisdiction of this counterclaim is conferred on the Court by Sections 1340 and 1345 of Title 28, United States Code, and Section 7402 of the Internal Revenue Code (26 U.S.C.).

23. The liability for the internal revenue taxes accrued within the Northern District of California.

24. On April 15, 1998, a delegate of the Secretary of the Treasury made an assessment in the amount of $23,262 against taxpayer Fior d'Italia for unpaid 1991-1992 Form 941 taxes, $2,324.00 for penalties and interest of $7,839.57.

25. Despite timely notice and demand for payment of the assessment described in paragraph 24 above, defendant Fior d'Italia has neglected, failed, or refused to pay the assessment described in paragraph 24 above, and there remains due and owing on said assessment, as of April 27, 1998, the sum of $33,425.87, plus accrued interest and penalties and other statutory additions as provided by law, minus any payments or credits.

WHEREFORE, having fully answered each and every allegation contained in plaintiff's complaint and upon its allegations set forth in its counterclaims against

plaintiff, Fior d'Italia, defendant United States of America prays:

(A) Plaintiff take nothing by its complaint;

(B) That judgment be entered in favor of the United States against Fior d'Italia in the amount of $33,425.57, plus interest and other additions from the date of assessment as provided by law, less any payments and abatements; and

(C) The United States of America be awarded its cost of suit.

(D) That the Court award such other relief as is just and proper.

MICHAEL J. YAMAGUCHI
United States Attorney

/s/ ILLEGIBLE
THOMAS MOORE
Assistant United States
Attorney
Tax Division

TAB E

* * * * *

[4]

reported tips as provided for by *Flora v. United States*, 362 U.S. 145 (1960) and *Steele v. United States*, 280 F.2d 89 (8th Cir., 1960).

For purpose of this litigation alone, Taxpayer does not dispute the facts, estimates and/or determinations used by IRS as a basis for its calculation of an amount of aggregate unreported tip income by all directly and indirectly tipped employees of the taxpayer collectively.

Whether or not one or more dollars of aggregate tip income was unreported by Taxpayer's employees collectively and the reasonableness of the estimate of that amount of aggregate tip income unreported by all the employer's employees collectively, is irrelevant to the question presented in this case however.

The only facts relevant to the Court's disposition of this Motion are:

1) That IRS made an assessment for employer share only FICA taxes on the basis of estimated aggregate unreported tip income of Taxpayer's employees collectively;

2) That there was no attempt to (or mechanism to) credit the Social Security Administration earnings record of individual employees with such additional tip income, and,

3) That the assessment against the employer was not based upon the determination of the amount of additional tip income earned by individual employees.

With respect to these material facts there is no genuine dispute and Taxpayer is entitled to Judgment as Matter of Law[2].

---

[2] Federal Rules Civil Procedure 56, *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986). *First National Life Insurance Co. v. California Pacific Life Insurance Co.*, 876 F.2d 877 (11th Cir. 1989).

TAB F

Form **8027**

Department of the Treasury
Internal Revenue Service

Employer's Annual Information Return of Tip Income and Allocated Tips

OMB No. 1545-0714

1991

Use IRS label. Make any necessary changes. Otherwise, please type or print.

Name of establishment

Address (number and street)

94-2420391
Employer identification number

City or town, state, and ZIP code

Kind of establishment (check only one box)

- ☐ 1 evening meals only
- ☒ 2 evening and other meals
- ☐ 3 meals other than evening meals
- ☐ 4 alcoholic beverages

Employer's name
Fior d' Italia, Inc

Establishment number (See instructions.)

Address (number, street, and room or suite no.)
601 Union St., S

City or town, state, and ZIP code
San Francisco, CA. 94133

If this is a Final Return, check here . . . . . ▶ ☑ If this is an Amended Return, check here . . . . . ▶ ☐

1	Total charged tips for 1991. . . . . Computer Tip Report	1	364,786
2	Total charged receipts (other than nonallocable receipts) showing charged tips . . . . Sales Journals	2	2,518,147
3	Total amount of service charges of less than 10% paid as wages to employees	3	0
4a	Total tips reported by indirectly tipped employees . . . . . Tip. Report	4a	30,977
b	Total tips reported by directly tipped employees	4b	216,204
c	Total tips reported (Add lines 4a and 4b.) . . . . . Form 941	4c	247,181
5	Gross receipts from food or beverage operations (other than nonallocable receipts). . . 1-2-3 P+L	5	2,786,239
6	Multiply line 5 by 8% (.08) or the lower rate shown here ▶ _____ granted by the district director	6	222,899
	Note: *If you have allocated tips using other than the calendar year (semimonthly, biweekly, quarterly, etc.), put an X on line 6 and enter the amount of allocated tips from your records on line 7. If you have been granted a rate lower than 8%, attach a copy of the district director's determination letter to this return.*		
7	Allocation of tips. If line 6 is more than line 4c, enter the difference here	7	N/a
	This amount must be allocated as tips to tipped employees working in this establishment. Check the box below that shows the method used for the allocation. (Show the portion, if any, attributable to each employee in box 7 of the employee's Form W-2.)		
a	Allocation based on hours-worked method (See instructions for restriction.) . . . ☐		
b	Allocation based on gross receipts method . . . . . ☐		
c	Allocation based on good faith agreement (Attach copy of agreement.) . . . . ☐		
8	Total number of directly tipped employees at this establishment during 1991 . . . . . W-2's 18		

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete.

Signature ▶ Rudy A Andreini Title ▶ Bookkeeper Date ▶ 2/27/92

For Paperwork Reduction Act Notice, see the separate instructions. Cat. No. 49989U Form **8027** (1991)

☆ U.S. GPO: 1991-285-586

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Form **8027**

Department of the Treasury
Internal Revenue Service

...ployer's Annual Information Return of Tip Income and Allocated Tips

OMB No. 1545-0714

1992

Use IRS label. Make any necessary changes. Otherwise, please type or print.

Name of establishment

Address (number and street)

94-2420391
Employer identification number

City or town, state, and ZIP code

Kind of establishment (check only one box)

- ☐ 1 evening meals only
- ☒ 2 evening and other meals
- ☐ 3 meals other than evening meals
- ☐ 4 alcoholic beverages

Establishment number (See instructions.)

Employer's name
Fior d' Italia, Inc.

Address (number, street, and room or suite no.)
601 Union St.

City or town, state, and ZIP code
San Francisco, CA. 94133

If this is a Final Return, check here . . . . . ▶ ☐ If this is an Amended Return, check here . . . . . ▶ ☐

1	Total charged tips for 1992 . . . . . monthly Resman cash Accum.	1	338,161
2	Total charged receipts (other than nonallocable receipts) showing charged tips . . . . Sales Journal	2	2,366,757
3	Total amount of service charges of less than 10% paid as wages to employees	3	0
4a	Total tips reported by indirectly tipped employees . . . . Payroll Reg. YTD	4a	19,155
b	Total tips reported by directly tipped employees	4b	201,690
c	Total tips reported (Add lines 4a and 4b.) . . . . . Form 941	4c	220,845
5	Gross receipts from food or beverage operations (other than nonallocable receipts) . . . 1-22 P+L	5	2,677,842
6	Multiply line 5 by 8% (.08) or the lower rate shown here ▶ _____ granted by the district director	6	206,227
	Note: *If you have allocated tips using other than the calendar year (semimonthly, biweekly, quarterly, etc.), put an X on line 6 and enter the amount of allocated tips from your records on line 7. If you have been granted a rate lower than 8%, attach a copy of the district director's determination letter to this return.*		
7	Allocation of tips. If line 6 is more than line 4c, enter the difference here	7	n/a
	This amount must be allocated as tips to tipped employees working in this establishment. Check the box below that shows the method used for the allocation. (Show the portion, if any, attributable to each employee in box 7 of the employee's Form W-2.)		
a	Allocation based on hours-worked method (See instructions for restriction.) . . . ☐		
b	Allocation based on gross receipts method . . . . . ☐		
c	Allocation based on good faith agreement (Attach copy of agreement.) . . . . . ☐		
8	Total number of directly tipped employees at this establishment during 1992 ▶ 19 W-2		

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete.

Signature ▶ Trudy Audiero Title ▶ Office Mgr. Date ▶ 8/26/93

For Paperwork Reduction Act Notice, see the separate instructions. Cat. No. 49999U Form **8027** (1992)

*U.S. GPO: 1992-343-034/60148

TAB G

Internal Revenue Service Department of the Treasury

District Director

1301 Clay Street
Oakland, CA 94612-5210

Fior D Italia Inc. 9549
601 Union Street
San Francisco, CA 94133

Person to Contact:
Gina Fresquez
Telephone Number:
(510) 637-2623

Refer Reply to:
94-2420391

Date: [Dec. 19,XX]

Dear Taxpayer:

This letter serves as your notice and demand as outlined in IRC section 3121(q) for the payment of the employer's IRC section 3111 FICA tax on unreported tips received by your employees in the amount of $23,262 on $304,074 of unreported tips from cash and charge sales from the periods 1991 and 1992.

This tax should be reported as an adjustment to FICA taxes on the employer's Form 941 for the calendar quarter in which this notice and demand is made.

A copy of this notice and demand must be attached to the return.

To avoid any possible deposit penalty, the tax must be deposited at an authorized bank, using Form 8190B, (Federal Tax Deposit Coupon) within your prescribed depository rules. If you have a payroll service depositing your payroll taxes, they should be notified of this notice immediately.

If you have any questions, please call the number listed above.

Sincerely,

/s/ JOE BENTAN
For Calvin E. Esselstrom
District Director

TAB H

Internal Revenue Service
District Director

Date: [SEP 17, 1996]

Person to Contact:
T. Laux
Contact Telephone Number:
(415) 522-6228

Tracey J. Power
POWER & COLEMAN
2300 Clarendon Blvd. #1107
Arlington, VA 22201

Dear Authorized Representative:

The enclosed material is furnished to you under the provisions of a power of attorney or other authorization you have on file with us. For your convenience we have listed below the name(s) of the taxpayer(s) to whom this material relates.

If you have any questions, please contact the person whose name and telephone number are shown above.

Sincerely,

/s/ ROBERT D. AH NEE
ROBERT D. AH NEE
District Director

Enclosures:
Letters
Reports
Taxpayer(s)' Name(s)

FIOR D'ITALIA, INC.
601 Union Street
San Francisco, Ca

Internal Revenue Service
District Director

Letter 950
Taxpayer Identifying Number:
94-2 0391
Form: 941
Person to Contact:
T. Laux
Telephone Number:
(415) 522-6228

FIOR D'ITALIA, INC.
601 Union Street
San Francisco, Ca

Tax Year Ended: December 31, 1994

Deficiency:
Increase in tax $ 23,262
Penalties
IRC 6656 (a) $ 2,324

Dear Taxpayer:

We are enclosing a report proposing adjustments to your tax for the year(s) shown above. Please read the report, decide whether you agree or disagree, and respond within 30 days from the date of this letter. [Our report may not reflect results of examinations of flow-through entities such as partnerships, S corporations, trust in which you may have an interest.]

IF YOU AGREE, you should:

1. Sign and date the enclosed agreement form.
2. Return the signed agreement form in the enclosed envelope.

3. Enclose payment of the tax and interest if additional tax is due. This will stop the compounding of interest. The person whose name and telephone number appear above will be able to tell you how much interest is due at the time you intend to make payment. (See the enclosed Publication 5 for additional payment information.)

After we receive your signed agreement form, we will process your case and bill you for any unpaid tax or interest, subject to acceptance by the district director.

IF YOU DO NOT AGREE and wish a conference with the Office of the Regional Director of Appeals, you MUST LET US KNOW within 30 days.

1. If the proposed change to your tax (including penalties) is $2,500 OR LESS, call the person whose name and telephone number appear above. He or she will arrange for your case to be forwarded to the office of appeals. Or, check the appropriate section at the end of this letter. An additional copy of this letter is provided for this purpose. Mail it in the enclosed envelope.
2. If the proposed change to your tax (including penalties) is more than $2,500 but $10,000 or less for any tax period, you must provide us with a BRIEF written statement of the disputed issues. An additional copy of this letter is provided for this purpose. Mail it to us the enclosed envelope.
3. If the proposed change to your tax (including penalties) is MORE THAN $10,000 for any tax period, we will require a written protest. Follow

the instructions in the enclosed Publication 5. Mail the protest to us in the enclosed envelope.

An appeals officer, who has not examined your return previously, will review your case. The appeals office is independent of the district director and resolves most disputes informally and promptly.

By going to the appeals office, you may avoid court costs, resolve the matter sooner, and prevent interest from compounding. An appeals officer will telephone you and arrange an appointment, if necessary.

If you do not reach an agreement with the appeals office or respond to this letter, we will process your case on the basis of the enclosed examination report. If you decide to bypass the appeals process and petition the tax court, normally your case will be assigned for settlement to an appeals office before the tax court hears the case. Also, you should be aware that the tax court does not have jurisdiction over excise or employment tax cases.

Please note too that under section 6673 of the Internal Revenue Code, the tax court can impose a penalty of up to $25,000 under certain conditions. These conditions include: if the court finds that the taxpayer instituted the proceedings primarily for delay; if the taxpayer's position is found to be frivolous or groundless; or if the taxpayer failed to pursue administrative remedies available.

IF YOU ARE UNSURE as to what to do or if you have other questions, call the person whose name and telephone number appear above. He or she will be glad to discuss your choices.

Sincerely,

/s/ ROBERT D. AH NEE
ROBERT D. AH NEE
District Director

Enclosures:
Copy of this letter
Examination Report
Agreement Form
Publications 5 and 594
Envelope

STATEMENT OF DISPUTED ISSUES

FIOR D'ITALIA, INC.	TIN: 94-2420391 REF: EG: 1368

Check appropriate block:

[ ] TAX (including penalties) IN DISPUTE IS $2,500 OR LESS FOR ANY TAX PERIOD (Note: You may call us with this request if you prefer.)

I disagree and wish a conference with an appeals officer.

_____

Signature Date

[ ] TAX (including penalties) IN DISPUTE IS OVER $2,500 BUT IS $10,000 OR LESS FOR ANY TAX PERIOD

Unagreed Adjustment(s): Reason for Disagreement:

(If more space is needed, attach a separate sheet.)

_____

Signature Date

EXPLANATION OF ADJUSTMENTS

NAME: FIOR D'ITALIA, INC. FORM 941
EIN : 94-2420391 DECEMBER 31, 1994

TAXPAYER POSITION:
FORM 8027. Employer's Annual Information Return of Tip Income and Allocated Tips for 1991 and 1992 were properly completed.

In response to the Notice and Demand, the taxpayer included $18.36 of employer's share of FICA taxes it believed to owe on Form 941 for the quarter ending December 31, 1994. The amount was determined based on $40.00 and $200.00 of unreported tips from a part-time employee in 1991 and 1992, respectively.

The representative on behalf of the taxpayer disagrees with the amount on the Notice and Demand and request for an abatement. The Internal Revenue Service have illegally applied the provisions of IRC 3121(q). The FICA tax determined is erroneous because it is based on the aggregate estimated unreported tips of all employees collectively rather than on the determination of the aggregate unreported tip income of individual employees. The tip adjustment to increase the employees earnings were not forwarded to the Social Security Administration so that each individual employee get credited for the additional earnings for the purpose of Social Security benefits. The adjustment of tax on the taxpayer is based on allegations of inacuracies another taxpayer's returns.

GOVERNMENT POSITION
The proposed adjustment is reasonably based on IRC Section 3121(q), therefore, the unreported tips subject

to FICA tax should be reported and paid on Form 941 for the quarter ending December 31, 1994.

CONCLUSION

Cash and charge tips received by the employees in the course of his/her employment are renumeration subject to employer's FICA tax. Employer's FICA tax of $23,262 for the unreported cash and charge tips for 1991 and 1992 are due.

EXPLANATION OF ADJUSTMENTS

NAME: FIOR D'ITALIA, INC. FORM 941
EIN : 94-2420391 DECEMBER 31, 1994

SOCIAL SECURITY TIPS INCOME ADJUSTMENT

	1991	1992	TOTAL
Per Return	$247,181	$220,845	
Per Exam	403,726	368,374	
Adjustments	$156,545	$147,529	$304,074

BACKGROUND

Fior D'Italia, Inc., the taxpayer, is located at 601 Union Street in San-Francisco, California. The taxpayer employed individuals to serve food and beverages. These employees received cash and credit card tips from customers. At the end of each shift, employees with credit card tips were reimbursed with cash by the taxpayer.

On December 19, 1994, a Notice and Demand was issued for the taxpayer's share of FICA tax in the amount of $23,262 on $304,074 of unreported cash and credit card tips for 1991 and 1992. See Exhibit A.

Of this $23,262 FICA tax, $18.36 was reported and paid by the taxpayer on Form 941 for the quarter ending December 31, 1994.

The taxpayer agrees with the sales and reported tips amount for 1991 and 1992.

LAW

IRC Section 3121(q)

Tips received by an employee in the course of his employment shall be considered renumeration for such employment. Such renumeration shall be deemed to be

paid (if no statement is furnished by the employee to the employer) at the time received or on the date on which notice an demand for such taxes is made to the employer by the Secretary (IRS Representative).

IRC Section 3111(a) and 3111(b) impose FICA tax on employer, rates are 6.2% and 1.45% on employees wages.

IRC Section 3401(a) defines wages.

IRC Section 3401(f) defines wages to include tips received by an employee in the course of his employment.

Interest on Deficiencies

Interest on deficiencies will accrue from the due date of the return until paid.

Failure To Make Deposit of Taxes IRC section 6656(a)

Since you did not deposit taxes within the time prescribed by law, and you have not shown that such failure was due to reasonable cause, a penalty of 40% of the amount of the underpayment is added to the tax in accordance with section 6656 of the Internal Revenue Code.

Instructions for Form 870

General Information

If you consent to the assessment of the deficiencies shown in this waiver, please sign and return the form in order to limit any interest charge and expedite the adjustment to your account. Your consent will not prevent you from filing a claim for refund (after you have paid the tax) if you later believe you are so entitled. It will not prevent us from later determining, if necessary, that you owe additional tax; nor extend the time provided by law for either action.

We have agreements with State tax agencies under which information about Federal tax, including increases or decrease, is exchanged with the States. If this change affects the amount of State income tax, you should file the required State form.

If you later file a claim and the Service disallows it, you may file suite for refund in a district court or in the United States Claims Court, but you may not file a petition with the United States Tax Court.

We will consider this waiver a valid claim for refund or credit of any overpayment due you resulting from any decrease in tax and penalties determined by the Internal Revenue Service, shown above, provided you sign and file it within the period established by law for making such a claim.

Who Must Sign

If you filed jointly, both you and your spouse must sign. If this waiver is for a corporation, it should be signed with the corporation name, followed by the signatures and titles of the corporate officers

authorized to sign. An attorney or agent may sign this waiver provided such action is specifically authorized by a power of attorney which, if not previously filed, must accompany this form.

If this waiver is signed by a person acting in a fiduciary capacity (for example, and executor, administrator, or a trustee) Form 56, Notice Concerning Fiduciary Relationship, should, unless previously filed, accompany this form.

EXHIBIT A

FIOR D' ITALIA, INC.

	1991	1992	TOTAL
Charge Tips (line 1, Form 8027)	364,786	338,161	
Charge Sales (line 2, Form 8027)	2,518,147	2,366,757	
Charge Tip Rate (line 1/line 2)	14.49%	14.29%	
Gross Receipts (Line 5, Form 8027)	2,786,239	2,577,842	
Total Tips Received (charge tip rate X gross receipts)	403,726	368,374	
Less: Total Tips Reported	247,181	220,845	
IRC 3121(q) (Adjustment)	156,545	147,529	$304,074
Employers FICA tax rate	7.65%	7.65%	
IRC 3121(q) tax	$11,976	$11,286	$23,262

Form 870	Department of the Treasury - Internal Revenue Service Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment	Date received by IRS

Names and address of taxpayers	Social security or employer identification number
FIOR D'ITALIA, INC. 601 Union Street San Francisco, Ca	94-2420391

Increase (Decrease) in Tax and Penalties

Tax Year Ended:	December 31, 1994
Deficiency:	
Increase in tax	$ 23,262
Penalties	
IRC 6656(a)	$ 2,324

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(For instructions, see next page)

Consent to Assessment and Collection

I consent to the immediate assessment and collection of any deficiencies (increase in tax and penalties) and accept any overassessment (decrease in tax and penalties) shown above, plus any interest provided by law. I understand that by signing this waiver, I will not be able to contest these years in the United States Tax Court, unless additional deficiencies are determined for these years.

Your Signature	Date signed
Spouse's Signature	Date signed
Taxpayer's Representative Sign Here	Date signed

Corporate Name:

Corporate Officers Sign Below

Signature	Title	Date signed
Signature	Title	Date signed

Form 870 (Rev. 3-92)

BEST AVAILABLE COPY

EXPLANATION OF ADJUSTMENTS

NAME: FIOR D'ITALIA, INC. FORM 941
EIN : 94-2420391 DECEMBER 31, 1994

FAILURE TO DEPOSIT PENALTY: $2,324

FACTS

On December 19, 1994, a Notice and Demand was issued for the employer's FICA tax in the amount of $23,262 on $304,074 of unreported cash and charge card tips for 1991 and 1992.

Of this $23,262 FICA tax due, $18.36 was reported and paid by the taxpayer on Form 941 for the quarter ending December 31, 1994.

LAW

IRC Section 6656(a) Underpayment of Deposits states in the case of failure to deposit on the date prescribed, unless it is shown that such failure is due to reasonable cause and not due to willfull neglect, there shall be imposed a penalty of 10 percent on the amount of the underpayment of tax.

TAXPAYER POSITION

Failure to deposit penalty is disputed because employer's IRC 3111 FICA tax is disputed.

CONCLUSION

Since the deposit as required by law was not fully paid, Failure to Deposit Penalty is asserted.

Form 4668 | Department of the Treasury -- Internal Revenue Service | Return form number

EMPLOYMENT TAX EXAMINATION CHANGES REPORT | 941

Name and address of employer
FIOR D' ITALIA, INC.
601 Union Street
San Francisco, CA 94133

Employer identification number
94-2420391

Calendar year
1994

Total tax plus penalty, or (decrease) in tax
$25,586

Last quarter of this examination
12/31/94

Examination discussed with (name and title)

( ) Agreed (Subject to acceptance by the District Director)
( ) Unagreed

	IRS Ref.	(a) Applicable Rate	(b) 1st Quarter	(c) 2nd Quarter	(d) 3rd Quarter	(e) 4th Quarter
1. Social security and Medicare wage adjustment subject to tax under IRC 3101 and 3111	004 073					
2. Social security and Medicare wage adjustment subject to tax under IRC 3509(a)	004 073					
3. Social security and Medicare wage adjustment subject to tax under IRC 3509(b)	004 073					
4. Social security and Medicare tip adjustment subject to tax under IRC ~~3201~~ and 3111(a) & (b)	005 073	6.20 1.45				$304,074 $304,074
5. Income tax withholding wage adjustment subject to tax under IRC 3402						
6. Income tax withholding wage adjustment subject to tax under IRC 3509						
7. Payments subject to backup withholding under IRC 3406						
8. Adjustment to social security and Medicare tax						
9. Adjustment to income tax withholding						
10. Total social security and Medicare tax (Lines 1,2,3,4 x rates) plus/minus Line 8	007					$ 23,262
11. Total income tax withholding (Lines 5,6 x rates) plus/minus Line 9	003					
12. Total backup withholding (Line 7 x rate)	008					
13. Delinquent tax or increase (decrease) in tax (Lines 9, 10 and 11)						
14. Penalty code section 6651						
15. Penalty code section 6656 Failure to Deposit						$ 2,324
16. Penalty code section						
17. Maximum tax available for abatement under IRC 3402(d)						none

23262
- 18.36
23243.64
x 10 %
$2324

Examiner's signature	Group No.	District	Date
T. Tiny	1368	San Francisco	

Seq #

[Names omitted]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CIVIL ACTION No. 97-4613 CAL

FIOR D'ITALIA, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

AFFIDAVIT OF JAMES M. BRIL

STATE OF CALIFORNIA
COUNTY OF MARIN

I, James M. Bril of full age, being duly sworn according to law, upon oath depose and say:

1. I am and was an employee during the calendar years 1991 and 1992 of Fior d' Italia, Inc., Plaintiff in the above referenced action, and I make this affidavit in support of Plaintiff's Motion for Summary Judgement.

2. It is, and during 1991 and 1992 was, the practice of directly tipped employees in the restaurant owned and operated by the plaintiff to share or give approximately 25% of their total tips received, whether cash or charge, to other indirectly tipped employees who assisted in providing service to tipping customers. More specifically, it is and was the practice in the restaurant for each directly tipped employee to give approximately 15% to busboys, 5% to bartenders and

5% to host and hostess who seated customers. It is possible many directly tipped employees gave a higher or lower percentage of their total tips to certain employees depending on the disposition and generosity of the directly tipped employee and the directly tipped employee's evaluation of the contribution made by the specific indirectly tipped employee.

3. To the best of my knowledge and belief these tip splitting practices and the customary percentages set forth above are and were known to all employees of the restaurant.

4. I do not know and I do not believe any directly tipped employees obtained a receipt or receipts from employees with whom they shared a percentage of their tips.

Further, Affiant sayeth not.

/s/ JAMES M. BRIL
JAMES M. BRIL

Sworn to or subscribed before me
this 15 day of May, 1998

[Seal Omitted]

/s/ CARLA FRITZ
CARLA FRITZ
Notary Public

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 15th day of May 1998, a true and correct copy of the foregoing AFFIDAVIT OF JAMES M. BRL [*sic*] *was mailed first class, postage prepaid to the following counsel of record for the Defendant.*

Thomas Moore, Esquire
U.S. Attorney's Office
10th Floor Federal Building
450 Golden Gate Avenue, Box 36055
San Francisco, CA 94102

/s/ JAMES M. BRIL
JAMES M. BRIL

TAB I

[Names Omitted]

LEE, TOOMEY & KEN
CHARTERED
1800 EIGHTEENTH STREET, N.W.
WASHINGTON, D.C. 20036
TELEPHONE (202) 457-6500
FACSIMILE (202) 457-7660
(202) 457-0551
CABLE ADDRESS "LEETAK"

July 14, 1993

Via Telecopy

Norman Goldstein
Senior Financial Executive
6401 Security Boulevard
451 Altmeyer Building
Baltimore, Maryland 21235

Re: Establishment of FICA Wage Base from FICA Tax Paid (or Assessed) on Tips

Dear Norm:

Thanks for sending me the information from the IRS Publications on tip reporting. These materials do not give me the specific information I need, however, to understand precisely how a particular FICA tax payment is used by SSA to credit the employee's Social Security and Medicare accounts.

I have outlined below the precise questions I was hoping to have answered, either by the SSA Program Operations Manual, or by some other SSA guidance available either through the SSA "Bulletin Board: system or otherwise.

(1) Which of the following payments will be used by SSA to credit the employee's wage history?

(a) Payment by the employer of the employer's share of FICA taxes on reported tips?

(b) Collection and deposit by the employer of the employee's share of FICA taxes on reported tips (to the extent collectible from the employee's wages)?

(c) Payment by the employee (with the employee's Form 1040, Line 53) of the uncollected employee FICA taxes on reported tips (reported in Box 13, Codes A and B) of the 1993 Form W-2)?

(d) Payment by the employee of employee FICA taxes on unreported tip income, as shown on Schedule U of Form 4137?

> Note: The employee may report an amount of "unreported tips" on Form 4137 that differs from the "allocated tip" amount reported in Boxes 5 and 7 of the 1993 Form W-2.

(e) Filing by the IRS of Form 885-T (including Schedule T-A) reporting an audit adjustment of employee FICA tax on unreported tip income (which increases the amount of tip income reported by the employee on Form 4137)?

(f) Assessment and collection by the IRS of the additional employee FICA taxes reflected on Form 885-T?

(g) Issuance of a "Notice and Demand" to the employer for additional employer FICA

taxes under Code section 3121(q) (as amended, effective in 1988)?

(h) Collection from an employer of additional employer FICA taxes under Code section 3121(q) (as amended, effective in 1988)?

(2) Are answers to these questions outlined in (1)(a) through (h) above available in the SSA Program Operations Manual or in another SSA publication?

(3) It is possible to get a written answer from SSA to these questions, if no other SSA guidance has been published?

To summarize these questions, Norm, I'm trying to find some written explanations from SSA of whether, following the 1987 change to Code section 3121(q), SSA delays crediting the employee's social security and Medicare benefit accounts until after *both* the employee and employer shares of FICA taxes have been paid (or at least assessed) with respect to any tips that are determined (by the employer, employee or the IRS) to have been paid to the server. Second, if payment (or assessment) of the *employee* share of FICA taxes is all that is used by SSA to establish the requisite wage history credit, how can employers be sure that every employer payment of FICA taxes (see question (1)(a), (g) and (h) above) will result in the crediting of an employee's wage history?

Many thanks, Norm, for your help in finding me answers to these procedural problems.

Sincerely yours,

/s/ MARY B. HEVENER
Mary B. Hevener

[Seal Omitted]

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration

Refer to: Baltimore, MD 21235

Ms. Handy Hevener [JUL 20, 1993]
Lee, Toomey & Kent
1200 Eighteenth Street, N.W.
Washington, DC 20036

Dear Handy:

This letter responds to your questions relative to the establishment of a FICA wage base from FICA taxes paid on tips. SSA has not promulgated specific guidance concerning the issues you raised in your July 14, 1993 letter. In fact, SSA relies heavily on IRS' guidance to implement its own processes.

With respect to the questions you asked, I believe the answers can be found in the IRS guidance that I previously provided. Essentially, the amounts reported to SSA on Forms W-2 or W–2c constitute the basis on which SSA would credit an employees Social Security or Medicare accounts.

Under Section 3121(q) of the Internal Revenue Code, tips received by an employee in the course of the employees employment are considered remuneration for that employment (and are deemed to have been paid by the employer for purposes of the employer portion of FICA taxes imposed by Section 3111(a) and (b) of the Code)). The remuneration is deemed to be paid when a written statement(s) including the tips is furnished to the employer by the employee pursuant to Section 6053(a) of the Code.

Section 6053(a) of the Code requires every employee, who in the course of the employees employment by an employer, who receives in any calendar month tips that are wages (as defined in Section 3121(a) or 3401(a)) to report all tips in one or more written statements furnished to the employer on or before the 10th day of the following month. These procedures are reflected in IRS Publication 531 (Reporting Income From Tips).

Publication 531 discusses how employers are to withhold FICA for employees and report those amounts on Form W-2s. For each calendar month during which an employee receives $20 or more in tips, the employee must give the employer a written statement(s) of cash and charge tips by the 10th day of the month after the month in which the tips are received. IRS Form 4070, Employees Report of Tips to Employer, is available for this purpose. In situations where employees do not report monthly an appropriate amount of tips, and the employer has 10 or more employees, the employer is required to allocate tips. The employer would then withhold the appropriate amount of FICA and Medicare taxes from the employees salary and that amount is incorporated into the annual Form W-2 reporting process.

Tips totaling less than $20 received by an employee during a single calendar month while working for any one employer are not wages for FICA tax purposes and are, therefore not required to be reported to the employer. If an employee works for more than one employer during a month, and receives less than $20 in tips while working for each employer, no tips are required to be reported to any of the employers.

Although these tips are not subject to FICA taxes, they are subject to Federal income taxes.

If an employee fails to tips to his/her employer, the employer is not liable for its portion of the FICA taxes on unreported tips until "notice and demand" for the taxes is made to the employer by the Internal Revenue Service. This occurs when the employee completes IRS Form 4137, Social Security Tax on Unreported Tip Income, and files it with his/her Form 1040, (U.S. Individual Income Tax Return). Upon receipt of the Form 4137, IRS will issue a "notice and demand" to the employer for the amount of tips received by an employee (or employees) who failed to report or under reported tips to the employer. The employer will reflect payment of this liability as a Line 9 adjustment on the IRS Form 941, Employers Quarterly Federal Tax Return. The employer should provide an explanation of this adjustment on a Form 941c and submit to SSA a Form W-2c, Statement of Corrected Income and Tax Amounts, and Form W-3c, Transmittal of Corrected Income and Tax Statements.

In summary, SSA credits an employees Social Security and Medicare benefit accounts upon receipt of an appropriate Form W-2 or W-2c. The IRS instructions provide the circumstances, basis and the procedures by which these forms are to be filed with SSA. SSA does not concern itself with the actual collection of taxes per se and that is not a factor in crediting an individuals' earnings record. As previously indicated, SSA credits an earnings record as soon as information is provided by the employer as to the appropriate FICA and Medicare earnings as reflected on a Form W-2 or W-2c.

I hope the information above is helpful to you. If you should still have additional questions, it may be helpful to provide a specific example or situation that I can relate to in providing a more specific response. However, bear in mind that IRS writes the tax laws and instructional guidance relative to FICA and Medicare wages. SSA's focus is more on procedural guidance relative to physically reporting information contained on Form W-2s and W-2Cs.

Please call me if you have additional questions or I can provide you with any additional information concerning this matter.

Sincerely,

/s/ NORMAN GOLDSTEIN
NORMAN GOLDSTEIN

TAB J

[Names/Addresses Omitted]

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

No. C-97-4613-CAL

FIOR D'ITALIA, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: May 29, 1998]

DECLARATION OF THOMAS MOORE

I, THOMAS MOORE, declare:

1. I am employed as an Assistant United States Attorney with the United States Attorney's Office, in San Francisco, California.

2. In such capacity I have been assigned to represent the United States in the above captioned matter.

3. A true and correct copy of the Form 4340, Certificate of Assessments and Payments for Fior D'Italia is attached hereto as Exhibit 1.

4. True and correct copies of the plaintiff's Form 941 for the periods at issue are attached hereto as Exhibit 2.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 28th, 1998, San Francisco, California.

/s/ THOMAS MOORE
THOMAS MOORE

TAB K

UNITED STATES [Seal Omitted] OF AMERICA

Department of the Treasury

Internal Revenue Service

Date: May 27, 1998

CERTIFICATE OF OFFICIAL RECORD

I certify that the annexed: Certificate of Assessments and Payments, is true for Fior D'Italia, Incorporated 9549, 601 Union Street, San Francisco, California, Employer Identification Number: 94-2420391, covering Quarterly, Withholding and Federal Insurance Contribution Act Tax for the period ending December 31, 1994

under the custody of this office.

[Seal Omitted] **IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of this office to be affixed, on the day and year first above written.**

By direction of the Secretary of the Treasury:

/s/ FRED ARRAS
FRED ARRAS
Chief, Accounting Branch

EXHIBIT 1

CERTIFICATE OF ASSESSMENTS AND PAYMENTS

EIN/SSN: 94-2420391

FIOR D'ITALIA, INC. 9549
601 UNION STREET
SAN FRANCISCO, CA

Date Rec'd	Explanation/ Locator Number	Assessments (Abatement)	Credits (Reversal)	Assessment Date
Type of Tax: QUARTERLY, WITHHOLDING & FICA TAX RETURN				
Period Ending: 12/31/94				
10/19/94	Federal tax deposit	0.00	11,906.47	
11/02/94	Federal tax deposit	0.00	12,127.98	
11/16/94	Federal tax deposit	0.00	10,720.74	
12/02/94	Federal tax deposit	0.00	10,703.75	
12/14/94	Federal tax deposit	0.00	8,880.16	
	Federal tax deposit	0.00	10,873.21	

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01/31/95	Return filed and tax assessed	65,230.65	0.00	03/27/95
02/01/95	Payment with return	0.00	18.34	
	Deposit penalty	1,369.46	0.00	07/10/95
07/10/95	First notice issued			
08/28/95	Deposit penalty abated	(1,369.46)	0.00	
	Audit deficiency tax assessed	23,262.00	0.00	04/27/98
	Deposit penalty	2,324.00	0.00	
	Interest	7,839.57	0.00	
04/27/98	First notice issued			

Continued on next page

CERTIFICATE OF ASSESSMENTS AND PAYMENTS

EIN/SSN: 94-2420391

FIOR D'ITALIA, INC. 9549
601 UNION STREET

Date Rec'd	Explanation/ Locator Number	Assessments (Abatement)	Credits (Reversal)	Assessment Date
(Continued: 12/31/94)				
	Account Balance:	$33,425.57		
	Accrued Interest:	309.08		06/08/98
	Accrued Penalty:	116.31		06/08/98
	Total Balance:	$33,850.96		
	Adjusted Gross Income:	NA.		
	Taxable Income:	NA.		

I certify that the foregoing transcript of the taxpayer named above in respect to the taxes specified, is a true and complete transcript for the period stated, of all assessments, penalties, interests, abatements, credits, refunds, and advance or unidentified payments relating thereto as disclosed by the records of this office as of the date of this certification.

Signature of Director, R Hon
(required for certification):

Location: IRS, Western Region
Fresno, CA

Chief, Accounting Branch

May 27, 1998
Date

TAB L

VBB/ /R /94/4/399 / 1

Form **941** (Rev. January 1994)
Department of the Treasury
Internal Revenue Service

4141

Employer's Quarterly Federal Tax Return

See separate instructions for information on completing this return.

Please type or print.

OMB No. 1545 0029

Enter state code for state in which deposits made (see page 2 of instructions).

Name (as distinguished from trade name)
FIOR D ILTALIA INC
Trade name, if any

Address (number and street)
601 UNION STREET

Date quarter ended
12/31/94
Employer identification number
94-2420391
City, state, and ZIP code
SAN FRANCISCO CA 94133

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T

If address is different from prior return, check here ▶ ☐

IRS Use

If you do not have to file returns in the future, check here ▶ ☐ and enter date final wages paid ▶

If you are a seasonal employer, see **Seasonal employers** on page 2 and check here (see instructions) ▶ ☐

1	Number of employees (except household) employed in the pay period that includes March 12th ▶			
2	Total wages and tips subject to withholding, plus other compensation		2	255679.94
3	Total income tax withheld from wages, tips, and sick pay		3	27506.92
4	Adjustment of withheld income tax for preceding quarters of calendar year		4	
5	Adjusted total of income tax withheld (line 3 as adjusted by line 4—see instructions)		5	27506 92
6a	Taxable social security wages	$ 166882.44 × 12.4% (.124) =	6a	20693.42
b	Taxable social security tips	$ 77397.00 × 12.4% (.124) =	6b	9597.23
7	Taxable Medicare wages and tips	$ 255679.94 × 2.9% (.029) =	7	7414.72
8	Total social security and Medicare taxes (add lines 6a, 6b, and 7). Check here if wages are not subject to social security and/or Medicare tax ▶ ☐		8	37705 37
9	Adjustment of social security and Medicare taxes (see instructions for required explanation) Sick Pay $ _____ ± Fractions of Cents $ _____ ± Other $ _____ =		9	18 36
10	Adjusted total of social security and Medicare taxes (line 8 as adjusted by line 9—see instructions)		10	37723 73
11	Total taxes (add lines 5 and 10)		11	65230 65
12	Advance earned income credit (EIC) payments made to employees, if any		12	
13	Net taxes (subtract line 12 from line 11). This should equal line 17, column (d) below (or line D of Schedule B (Form 941))		13	65230 65
14	Total deposits for quarter, including overpayment applied from a prior quarter		14	65212 31
15	Balance due (subtract line 14 from line 13). Pay to Internal Revenue Service		15	18 34
16	Overpayment, if line 14 is more than line 13, enter excess here ▶ $ _____ and check if to be: ☐ Applied to next return OR ☐ Refunded.			

- **All filers:** If line 13 is less than $500, you need not complete line 17 or Schedule B. ☐
- **Semiweekly depositors:** Complete Schedule B and check here ☐
- **Monthly depositors:** Complete line 17, columns (a) through (d) and check here ☐

17 Monthly Summary of Federal Tax Liability.

(a) First month liability	(b) Second month liability	(c) Third month liability	(d) Total liability for quarter

Sign Here Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete.

Signature ▶ _____ Print Your Name and Title ▶ Robert Lorick Pres. Date ▶ 1/30/95

For Paperwork Reduction Act Notice, see page 1 of separate instructions. Cat. No. 17001Z **EXHIBIT** Form 941 (Rev. 1-94).

1

Form **941**
(Rev. January 1991)
Department of the Treasury
Internal Revenue Service

4141

Employer's Quarterly Federal Tax Return

▶ See Circular E for more information concerning employment tax returns.

Please type or print.

OMB No. 1545-0029
Expires: 5-31-93

Your name, address, employer identification number, and calendar quarter of return. (If not correct, please change.)

94-2420391 JUN91
FIOR D'ITALIA, INC.
601 UNION STREET
SAN FRANCISCO, CA 94133

AMENDED

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If address is different from prior return, check here ▶ ☐

(FOR YOUR RECORDS)

If you do not have to file returns in the future, check here . . . ▶ ☐ Date final wages paid . . . ▶

If you are a seasonal employer, see Seasonal employers on page 2 and check here . ▶ ☐

1a	Number of employees (except household) employed in the pay period that includes March 12th . ▶	1a	
b	If you are a subsidiary corporation AND your parent corporation files a consolidated Form 1120, enter parent corporation employer identification number (EIN) . . ▶ 1b –		
2	Total wages and tips subject to withholding, plus other compensation . . . . . ▶	2	263,610 30
3	Total income tax withheld from wages, tips, pensions, annuities, sick pay, gambling, etc. . . ▶	3	25,121 81
4	Adjustment of withheld income tax for preceding quarters of calendar year (see instructions) . . ▶	4	
5	Adjusted total of income tax withheld (line 3 as adjusted by line 4—see instructions)	5	25,121 81
6a	Taxable social security wages (Complete line 7) $ 199,689 30 × 12.4% (.124) =	6a	24,761 47
b	Taxable social security tips $ 63,921 00 × 12.4% (.124) =	6b	7,926 20
7	Taxable Medicare wages and tips $ 263,610 30 × 2.9% (.029) =	7	7,644 70
8	Total social security and Medicare taxes (add lines 6a, 6b, and 7)	8	40,332 37
9	Adjustment of social security and Medicare taxes (see instructions for required explanation) . . .	9	04 F/O
10	Adjusted total of social security and Medicare taxes (line 8 as adjusted by line 9—see instructions) ▶	10	40,332 41
11	Backup withholding (see instructions)	11	
12	Adjustment of backup withholding tax for preceding quarters of calendar year. . . . . ▶	12	
13	Adjusted total of backup withholding (line 11 as adjusted by line 12)	13	
14	Total taxes (add lines 5, 10, and 13)	14	65,454 22
15	Advance earned income credit (EIC) payments made to employees, if any . . . . . ▶	15	
16	Net taxes (subtract line 15 from line 14). This should equal line IV below (plus line IV of Schedule A (Form 941) if you have treated backup withholding as a separate liability)	16	65,454 22
17	Total deposits for quarter, including overpayment applied from a prior quarter, from your records. ▶	17	65,454 22
18	Balance due (subtract line 17 from line 16). This should be less than $500. Pay to IRS . . . . ▶	18	
19	Overpayment, if line 17 is more than line 16, enter here ▶ $ _____ and check if to be: ☐ Applied to next return OR ☐ Refunded.		

Record of Federal Tax Liability (You must complete if line 16 is $500 or more and Schedule B is not attached.) See instructions before checking these boxes.
Check only if you made deposits using the 95% rule ▶ ☐ Check only if you are a first time 3-banking-day depositor. . . ▶ ☐

Do NOT Show Federal Tax Deposits Here

Date wages paid	Show tax liability here, not deposits. IRS gets deposit data from FTD coupons.					
	First month of quarter		Second month of quarter		Third month of quarter	
▶ 1st through 3rd	A		I	9,048.25	Q	
4th through 7th	B	8,917.31	J		R	
8th through 11th	C		K		S	
12th through 15th	D		L		T	8,414.32
16th through 19th	E	9,423.07	M	9,711.88	U	
20th through 22nd	F		N		V	
23rd through 25th	G		O		W	
26th through the last	H		P	9,549.96	X	10,389.43
▶ Total liability for month	I	18,340.38	II	28,310.09	III	18,803.75

IV Total for quarter (add lines I, II, and III). This should equal line 16 above . . . . . ▶ 65,454.22

Sign Here Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete.

Signature ▶ Print Your Name and Title ▶ AGENT IN FACT Date ▶ 3/03/92 JA45

For Paperwork Reduction Act Notice, see page 2.

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Form 941 (Rev. January 1991)
Department of the Treasury
Internal Revenue Service

Employer's Quarterly Federal Tax Return

4141

► See Circular E for more information concerning employment tax returns.

Please type or print.

OMB No. 1545-0029
Expires: 5-31-93

Type or print your name, address, employer identification number, and calendar quarter of return as shown on original.

94-2420391 JUN91
FIOR D'ITALIA INC.
601 UNION ST.
SAN FRANCISCO CA 94133

COPY

If you do not have to file returns in the future, check here . . . ► ☐ Date final wages paid . . . ►

If you are a seasonal employer, see Seasonal employers on page 2 and check here . ► ☐

1a	Number of employees (except household) employed in the pay period that includes March 12th . ►	1a	
b	If you are a subsidiary corporation AND your parent corporation files a consolidated Form 1120, enter parent corporation employer identification number (EIN) . . ►	1b	–
2	Total wages and tips subject to withholding, plus other compensation . . . . . ►	2	270,514.20
3	Total income tax withheld from wages, tips, pensions, annuities, sick pay, gambling, etc. . . ►	3	25,121.81
4	Adjustment of withheld income tax for preceding quarters of calendar year (see instructions) . . ►	4	
5	Adjusted total of income tax withheld (line 3 as adjusted by line 4—see instructions)	5	25,121.81
6a	Taxable social security wages (Complete line 7) $ 199,689.30 × 12.4% (.124) =	6a	24,761.47
b	Taxable social security tips $ 63,921.00 × 12.4% (.124) =	6b	7,926.20
7	Taxable Medicare wages and tips $ 263,610.30 × 2.9% (.029) =	7	7,644.70
8	Total social security and Medicare taxes (add lines 6a, 6b, and 7)	8	40,332.37
9	Adjustment of social security and Medicare taxes (see instructions for required explanation) . . .	9	.04 F/C
10	Adjusted total of social security and Medicare taxes (line 8 as adjusted by line 9—see instructions) ►	10	40,332.41
11	Backup withholding (see instructions) . . . . . ►	11	
12	Adjustment of backup withholding tax for preceding quarters of calendar year.	12	
13	Adjusted total of backup withholding (line 11 as adjusted by line 12)	13	
14	Total taxes (add lines 5, 10, and 13) . . . . . ►	14	65,454.22
15	Advance earned income credit (EIC) payments made to employees, if any . . . . . ►	15	
16	Net taxes (subtract line 15 from line 14). This should equal line IV below (plus line IV of Schedule A (Form 941) if you have treated backup withholding as a separate liability)	16	65,454.22
17	Total deposits for quarter, including overpayment applied from a prior quarter, from your records. ►	17	65,454.22
18	Balance due (subtract line 17 from line 16). This should be less than $500. Pay to IRS . . . ►	18	
19	Overpayment, if line 17 is more than line 16, enter here ► $ _____ and check if to be: ☐ Applied to next return OR ☐ Refunded.		

Record of Federal Tax Liability (You must complete if line 16 is $500 or more and Schedule B is not attached.) See instructions before checking these boxes.
Check only if you made deposits using the 95% rule ► ☐ Check only if you are a first time 3-banking-day depositor . . . ► ☐

Do NOT Show Federal Tax Deposits Here

Date wages paid	First month of quarter		Second month of quarter		Third month of quarter	
1st through 3rd	A		I	9,048.25	Q	
4th through 7th	B	8,917.31	J		R	
8th through 11th	C		K		S	
12th through 15th	D		L		T	8,414.32
16th through 19th	E	9,423.07	M	9,711.88	U	
20th through 22nd	F		N		V	
23rd through 25th	G		O		W	
26th through the last	H		P	9,549.96	X	10,389.43
Total liability for month	I	18,340.38	II	28,310.09	III	18,803.75

► IV Total for quarter (add lines I, II, and III). This should equal line 16 above . . . . . ► 65,454.22

Sign Here

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete.

Signature ►

Print Your Name and Title ► AGENT IN FACT

Date ► JUNE 30, 1991

Form **941**
(Rev. January 1991)
Department of the Treasury
Internal Revenue Service

4141

Employer's Quarterly Federal Tax Return

▶ See Circular E for more information concerning employment tax returns.

Please type or print.

OMB No. 1545-0029
Expires: 5-31-93

Type or print your name, address, employer identification number, and calendar quarter of return as shown on original.

94-2420391 SEP91
FIOR D'ITALIA INC.
601 UNION ST.
SAN FRANCISCO CA 94133

YOUR COPY

If you do not have to file returns in the future, check here . . . ▶ ☐ Date final wages paid . . . ▶

If you are a seasonal employer, see Seasonal employers on page 2 and check here . ▶ ☐

1a	Number of employees (except household) employed in the pay period that includes March 12th . ▶	1a	
b	If you are a subsidiary corporation AND your parent corporation files a consolidated Form 1120, enter parent corporation employer identification number (EIN) . . ▶ 1b –		
2	Total wages and tips subject to withholding, plus other compensation . . . . . ▶	2	228,219.72
3	Total income tax withheld from wages, tips, pensions, annuities, sick pay, gambling, etc. . . ▶	3	21,611.04
4	Adjustment of withheld income tax for preceding quarters of calendar year (see instructions) . . ▶	4	
5	Adjusted total of income tax withheld (line 3 as adjusted by line 4—see instructions) . . . ▶	5	21,611.04
6a	Taxable social security wages (Complete line 7) $ 170,314.72 × 12.4% (.124) =	6a	21,119.03
b	Taxable social security tips $ 57,905.00 × 12.4% (.124) =	6b	7,180.22
7	Taxable Medicare wages and tips $ 228,219.72 × 2.9% (.029) =	7	6,618.37
8	Total social security and Medicare taxes (add lines 6a, 6b, and 7)	8	34,917.62
9	Adjustment of social security and Medicare taxes (see instructions for required explanation) . . .	9	.01 F
10	Adjusted total of social security and Medicare taxes (line 8 as adjusted by line 9—see instructions) ▶	10	34,917.63
11	Backup withholding (see instructions)	11	
12	Adjustment of backup withholding tax for preceding quarters of calendar year. . . . . ▶	12	
13	Adjusted total of backup withholding (line 11 as adjusted by line 12)	13	
14	Total taxes (add lines 5, 10, and 13)	14	56,594.67 ☐
15	Advance earned income credit (EIC) payments made to employees, if any . . . . . ▶	15	
16	Net taxes (subtract line 15 from line 14). This should equal line IV below (plus line IV of Schedule A (Form 941) if you have treated backup withholding as a separate liability)	16	56,594.67
17	Total deposits for quarter, including overpayment applied from a prior quarter, from your records. ▶	17	56,594.67
18	Balance due (subtract line 17 from line 16). This should be less than $500. Pay to IRS . . . . ▶	18	
19	Overpayment, if line 17 is more than line 16, enter here ▶ $ _____ and check if to be: ☐ Applied to next return OR ☐ Refunded.		

Record of Federal Tax Liability (You must complete if line 16 is $500 or more and Schedule B is not attached.) See instructions before checking these boxes.
Check only if you made deposits using the 95% rule ▶ ☐ Check only if you are a first time 3-banking-day depositor. . . ▶ ☐

Do NOT Show Federal Tax Deposits Here

Show tax liability here, not deposits. IRS gets deposit data from FTD coupons.

Date wages paid	First month of quarter		Second month of quarter		Third month of quarter	
1st through 3rd	A		I		Q	
4th through 7th	B		J		R	6,753.26
8th through 11th	C	8,791.66	K	8,640.23	S	
12th through 15th	D	33.73	L		T	
16th through 19th	E		M		U	
20th through 22nd	F		N	10,335.60	V	9,445.77
23rd through 25th	G		O	74.60	W	
26th through the last	H	10,319.82	P		X	
Total liability for month	I	19,145.21	II	19,250.43	III	18,199.03
IV Total for quarter (add lines I, II, and III). This should equal line 16 above . . . . . ▶						56,594.67

Sign Here

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete.

Signature ▶

Print Your Name and Title ▶ AGENT IN FACT

Date ▶ OCT 31,19

Form 941 (Rev. January 1991)
Department of the Treasury
Internal Revenue Service

Employer's Quarterly Federal Tax R

4141

► See Circular E for more information concerning employment

Please type or print.

Type or print your name, address, employer identification number, and calendar quarter of return as shown on original.

94-2420391 JUN91 4th Qtr
FIOR D'ITALIA INC.
601 UNION ST.
SAN FRANCISCO CA 94133

COPY

84

If you do not have to file returns in the future, check here . . . ► ☐ Date final wages paid . . . ►

If you are a seasonal employer, see Seasonal employers on page 2 and check here . ► ☐

1a	Number of employees (except household) employed in the pay period that includes March 12th . ►	1a	
b	If you are a subsidiary corporation AND your parent corporation files a consolidated Form 1120, enter parent corporation employer identification number (EIN) . . ► 1b –		
2	Total wages and tips subject to withholding, plus other compensation . . . . . ►	2	251,181 98
3	Total income tax withheld from wages, tips, pensions, annuities, sick pay, gambling, etc. . . ►	3	25,121 81
4	Adjustment of withheld income tax for preceding quarters of calendar year (see instructions) . . ►	4	
5	Adjusted total of income tax withheld (line 3 as adjusted by line 4—see instructions)	5	25,121 81
6a	Taxable social security wages (Complete line 7) $ 166,811.98 × 12.4% (.124) =	6a	24,760 47
b	Taxable social security tips $ 72,250.00 × 12.4% (.124) =	6b	7,926 20
7	Taxable Medicare wages and tips $ 251,181.98 × 2.9% (.029) =	7	7,284 70
8	Total social security and Medicare taxes (add lines 6a, 6b, and 7)	8	40,331 37
9	Adjustment of social security and Medicare taxes (see instructions for required explanation) . . .	9	04 F/O
10	Adjusted total of social security and Medicare taxes (line 8 as adjusted by line 9—see instructions) ►	10	40,331 41
11	Backup withholding (see instructions)	11	
12	Adjustment of backup withholding tax for preceding quarters of calendar year. . . . . ►	12	
13	Adjusted total of backup withholding (line 11 as adjusted by line 12)	13	
14	Total taxes (add lines 5, 10, and 13)	14	65,453 22
15	Advance earned income credit (EIC) payments made to employees, if any . . . . . ►	15	
16	Net taxes (subtract line 15 from line 14). This should equal line IV below (plus line IV of Schedule A (Form 941) if you have treated backup withholding as a separate liability)	16	65,453 22
17	Total deposits for quarter, including overpayment applied from a prior quarter, from your records. ►	17	65,453 22
18	Balance due (subtract line 17 from line 16). This should be less than $500. Pay to IRS . . . ►	18	
19	Overpayment, if line 17 is more than line 16, enter here ► $ _____ and check if to be: ☐ Applied to next return OR ☐ Refunded.		

Record of Federal Tax Liability (You must complete if line 16 is $500 or more and Schedule B is not attached.) See instructions before checking these boxes.
Check only if you made deposits using the 95% rule ► ☐ Check only if you are a first time 3-banking-day depositor. . . ► ☐

Do NOT Show Federal Tax Deposits Here

Date wages paid	First month of quarter		Second month of quarter		Third month of quarter	
► 1st through 3rd	A		I	9,048.25	Q	
4th through 7th	B	8,917.31	J		R	
8th through 11th	C		K		S	
12th through 15th	D		L		T	8,414.32
16th through 19th	E	9,423.07	M	9,711.88	U	
20th through 22nd	F		N		V	
23rd through 25th	G		O		W	
26th through the last	H		P	9,549.96	X	10,389.43
► Total liability for month	*I*	18,340.38	*II*	28,310.09	*III*	18,803.75
IV Total for quarter (add lines *I*, *II*, and *III*). This should equal line 16 above . . . . . ►						65,454.22

Sign Here

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete.

Signature ► Print Your Name and Title AGENT IN FACT

nployment Development Departme

Sacramento CA 94247-0001

941 Employer's Quarterly Federal Tax Return

(Rev. January 1991)
Department of the Treasury
Internal Revenue Service

4141 ▶ See Circular E for more information concerning employment tax returns.

OMB No. 1545-0029
Expires: 5-31-93

1992

Type or print your name, address, employer identification number, and calendar quarter of return as shown on original.

94-2520391 MARV
FIDE
6001 UNIDN ST
SAN FRANCISCO CA 94133

DELINQUENT IF NOT POSTMARKED OR RECEIVED BY

Q1	# 48,184
Q2	51,666
Q3	54,378
Q4	66,600
Total	220,828

Reported tips
Wages = 180.

COPY

If you do not have to file returns in the future, check here ▶ and enter date final wages paid ▶

If you are a seasonal employer, see Seasonal employers on page 2 and check here ▶

1a	Number of employees (except household) employed in the pay period that includes March 12th ▶	1a
b	If you are a subsidiary corporation AND your parent corporation files a consolidated Form 1120, enter parent corporation employer identification number (EIN) ▶	1b
2	Total wages and tips, plus other compensation ▶	2 195,666 78

85

BEST AVAILABLE COPY

3	Total income tax withheld from wages, tips, pensions, annuities, sick pay, gambling, etc. ▶		3 16,814.42
4	Adjustment of withheld income tax for preceding quarters of calendar year (see instructions) ▶		4
5	Adjusted total of income tax withheld (line 3 as adjusted by line 4—see instructions)		5 16,814.42
6a	Taxable social security wages (Complete line 6a, 6b, 7, and 8 only if this is the Final return.)	$ 147,482.78 × 12.4% (.124) =	6a 18,287.86
b	Taxable social security tips	$ 48,184.00 × 12.4% (.124) =	6b 5,974.82
7	Taxable Medicare wages and tips	$ 195,666.78 × 2.9% (.029) =	7 5,674.34
8	Total social security and Medicare taxes (add lines 6a, 6b, and 7)		8 29,937.02
9	Adjustment of social security and Medicare taxes (see instructions for required explanation)		9 .03 F/C
10	Adjusted total of social security and Medicare taxes (line 8 as adjusted by line 9—see instructions) ▶		10 29,937.05
11	Backup withholding (see instructions)		11
12	Adjustment of backup withholding tax for preceding quarters of calendar year		12
13	Adjusted total of backup withholding (line 11 as adjusted by line 12)		13
14	Total taxes (add lines 5, 10, and 13)		14 46,751.47
15	Advance earned income credit (EIC) payments made to employees, if any ▶		15
16	Net taxes (subtract line 15 from line 14). This should equal line IV below (plus line IV of Schedule A (Form 941) if you have treated backup withholding as a separate liability) ▶		16 46,751.47
17	Total deposits for quarter, including overpayment applied from a prior quarter, from your records. ▶		17 46,751.47
18	Balance due (subtract line 17 from line 16). This should be less than $500. Pay to IRS ▶		18
19	Overpayment, if line 17 is more than line 16, enter here ▶ $ and check if to be: Applied to next return ? OR Refunded.		

Record of Federal Tax Liability (You must complete if line 16 is $500 or more and Schedule B is not attached.) See instructions before checking these boxes.
Check only if you made deposits using the 95% rule ▶ ☐ Check only if you are a first time 3-banking-day depositor. ▶ ☐

Do NOT Show Federal Tax Deposits Here

Date wages paid	Show tax liability here, not deposits. IRS gets deposit data from FTD coupons.					
	First month of quarter		Second month of quarter		Third month of quarter	
1st through 3rd	A		I		Q	
4th through 7th	B		J	7,278.31	R	7,078.42
8th through 11th	C	9,081.51	K		S	
12th through 15th	D		L		T	
16th through 19th	E		M		U	
20th through 22nd	F		N	7,817.19	V	7,627.80
23rd through 25th	G	7,868.24	O		W	
26th through the last	H		P		X	
Total liability for month	I	16,949.75	II	15,095.50	III	14,706.22

IV Total for quarter (add lines I, II, and III). This should equal line 16 above ▶ 46,751.47

Sign Here Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete.

Signature ▶ _____ Print Your Name and Title ▶ AGENT IN FACT Date ▶ APRIL 30,199

this page OR total of [illegible]

Form **941** (Rev. January 1992) — Department of the Treasury, Internal Revenue Service

Employer's Quarterly Federal Tax Return

4141 ▶ See Circular E for more information concerning employment tax returns. Please type or print.

Type or print your name, address, employer identification number, and calendar quarter of return as shown on original.

Name (as distinguished from trade name)

FIOR D'ITALIA INC

Trade name, if any

601 UNION ST.

Address (number and street)

SAN FRANCISCO, CA 94133

Employer identification number: 94-2420391

Date final wages paid ▶

If you are a seasonal employer, see Seasonal employers on page 2 and check here ▶ ☐

YOUR COPY

1	Number of employees (except household) employed in the pay period that includes March 12th ▶	1	
2	Total wages and tips subject to withholding, plus other compensation ▶	2	228,722.67
3	Total income tax withheld from wages, tips, pensions, annuities, sick pay, gambling, etc. ▶	3	19,233.54
4	Adjustment of withheld income tax for preceding quarters of calendar year (see instructions) ▶	4	
5	Adjusted total of income tax withheld (line 3 as adjusted by line 4—see instructions)	5	19,233.54
6a	Taxable social security wages (Complete line 7) $ 177,056.67 × 12.4% (.124) =	6a	21,955.03
b	Taxable social security tips (Complete line 7) $ 51,666.00 × 12.4% (.124) =	6b	6,406.58
7	Taxable Medicare wages and tips $ 228,722.67 × 2.9% (.029) =	7	6,632.96
8	Total social security and Medicare taxes (add lines 6a, 6b, and 7)	8	34,994.57
9	Adjustment of social security and Medicare taxes (see instructions for required explanation)	9	.03 F/U
10	Adjusted total of social security and Medicare taxes (line 8 as adjusted by line 9—see instructions) ▶	10	34,994.60
11	Backup withholding (see instructions)	11	
12	Adjustment of backup withholding tax for preceding quarters of calendar year	12	
13	Adjusted total of backup withholding (line 11 as adjusted by line 12)	13	
14	Total taxes (add lines 5, 10, and 13)	14	54,228.14
15	Advance earned income credit (EIC) payments made to employees, if any ▶	15	
16	Net taxes (subtract line 15 from line 14). This should equal line IV below (plus line IV of Schedule A (Form 941) if you have treated backup withholding as a separate liability)	16	54,228.14
17	Total deposits for quarter, including overpayment applied from a prior quarter, from your records ▶	17	54,228.14
18	Balance due (subtract line 17 from line 16). This should be less than $500. Pay to Internal Revenue Service ▶	18	
19	Overpayment, if line 17 is more than line 16, enter excess here ▶ $ and check if to be: ☐ Applied to next return OR ☐ Refunded.		

Record of Federal Tax Liability (You must complete if line 16 is $500 or more and Schedule B is not attached.) See instructions before checking these boxes.

If you made deposits using the 95% rule, check here ▶ ☐ If you are a first time 3-banking-day depositor, check here ▶ ☐

DO NOT Show Federal Tax Deposits Here

Show tax liability here, not deposits. The IRS gets deposit data from FTD coupons.

Date wages paid	First month of quarter		Second month of quarter		Third month of quarter	
1st through 3rd	A	7,079.86	I	7,599.45	Q	
4th through 7th	B		J		R	
8th through 11th	C		K		S	
12th through 15th	D		L	7,695.89	T	7,369.45
16th through 19th	E	8,277.03	M		U	
20th through 22nd	F		N		V	
23rd through 25th	G		O		W	
26th through the last	H		P	8,186.30	X	8,020.16
Total liability for month	*I*	15,356.89	*II*	23,481.64	*III*	15,389.61

IV Total for quarter (add lines *I*, *II*, and *III*). This should equal line 16 above ▶ 54,228.14

Sign Here Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete.

Signature ▶

Print Your Name and Title ▶ AGENT IN FACT Date ▶ JULY 31, 199

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Form **941** (Rev. January 1992)
Department of the Treasury
Internal Revenue Service

Employer's Quarterly Federal Tax Return

4141 ▶ See Circular E for more information concerning employment tax returns.
Please type or print clearly.

Type or print your name, address, employer identification number, and calendar quarter of return as shown on original.

Name (as distinguished from trade name) — Date quarter ended
FIGR-O-MATIC INC — 12/31/92
Trade name, if any — Employer identification number
601 UNION ST. — 94-2420391
Address (number and street) — City, state, and ZIP code
SAN FRANCISCO, CA 94133

YOUR COPY

If you do not have to file returns in the future, check here ▶ ☐ Date final wages paid ▶
If you are a seasonal employer, see Seasonal employers on page 2 and check here ▶ ☐

1	Number of employees (except household) employed in the pay period that includes March 12th ▶	1	
2	Total wages and tips subject to withholding, plus other compensation ▶	2	236,699 32
3	Total income tax withheld from wages, tips, pensions, annuities, sick pay, gambling, etc. ▶	3	23,128 01
4	Adjustment of withheld income tax for preceding quarters of calendar year (see instructions) ▶	4	
5	Adjusted total of income tax withheld (line 3 as adjusted by line 4—see instructions)	5	23,128 01
6a	Taxable social security wages (Complete line 7) $ 182,324.32 × 12.4% (.124) =	6a	22,608 22
b	Taxable social security tips (Complete line 7) $ 54,375.00 × 12.4% (.124) =	6b	6,742 50
7	Taxable Medicare wages and tips $ 236,699.32 × 2.9% (.029) =	7	6,864 28
8	Total social security and Medicare taxes (add lines 6a, 6b, and 7)	8	36,215 00
9	Adjustment of social security and Medicare taxes (see instructions for required explanation)	9	01
10	Adjusted total of social security and Medicare taxes (line 8 as adjusted by line 9—see instructions) ▶	10	36,215 01
11	Backup withholding (see instructions)	11	
12	Adjustment of backup withholding tax for preceding quarters of calendar year	12	
13	Adjusted total of backup withholding (line 11 as adjusted by line 12)	13	
14	Total taxes (add lines 5, 10, and 13)	14	59,343 02
15	Advance earned income credit (EIC) payments made to employees, if any ▶	15	
16	Net taxes (subtract line 15 from line 14). This should equal line IV below (plus line IV of Schedule A (Form 941) if you have treated backup withholding as a separate liability)	16	59,343 02
17	Total deposits for quarter, including overpayment applied from a prior quarter, from your records ▶	17	59,343 02
18	Balance due (subtract line 17 from line 16). This should be less than $500. Pay to Internal Revenue Service ▶	18	
19	Overpayment, if line 17 is more than line 16, enter excess here ▶ $ ☐ Applied to next return OR ☐ Refunded.		

Record of Federal Tax Liability (You must complete if line 16 is $500 or more and Schedule B is not attached.) See instructions before checking these boxes.
If you made deposits using the 95% rule, check here ▶ ☐ If you are a first time 3-banking-day depositor, check here ▶ ☐

DO NOT Show Federal Tax Deposits Here

Show tax liability here, not deposits. The IRS gets deposit data from FTD coupons.

Date wages paid	First month of quarter		Second month of quarter		Third month of quarter	
1st through 3rd	A		I		Q	
4th through 7th	B		J	9,180.00	R	9,664.66
8th through 11th	C	9,707.01	K		S	
12th through 15th	D		L		T	
16th through 19th	E		M		U	9,980.31
20th through 22nd	F		N	10,418.22	V	
23rd through 25th	G	10,392.82	O		W	
26th through the last	H		P		X	
Total liability for month	I	20,099.83	II	19,598.22	III	19,644.97

IV Total for quarter (add lines I, II, and III). This should equal line 16 above ▶ 59,343.02

Sign Here Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete.

Signature ▶ Print Your Name and Title ▶ AGENT IN FACT Date ▶ OCT. 31, 19

CFINCPROS7 1991 28

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941 (January 1992)
Department of the Treasury
Internal Revenue Service

Employer's Quarterly Federal Tax Return

▶ See Circular E for information concerning employment tax returns.

Type or print your name, address, employer identification number, and calendar quarter of return as shown on original.

Name (as distinguished from trade name)
FIOR D' ITALY
Trade name, if any
601 UNION ST
Address (number, city, and street)
SAN FRANCISCO CA 94133
Employer identification number
94-2520391

YOUR COPY

If you do not have to file returns in the future, check here ▶ ☐ and enter date final wages paid ▶
If you are a seasonal employer, see Seasonal employers on page 2 and check here ▶ ☐

1	Number of employees (except household) employed in the pay period that includes March 12th ▶	1	
2	Total wages and tips subject to withholding, plus other compensation ▶	2	287,705 47
3	Total income tax withheld from wages, tips, pensions, annuities, sick pay, gambling, etc. ▶	3	29,865 83
4	Adjustment of withheld income tax for preceding quarters of calendar year (see instructions) ▶	4	
5	Adjusted total of income tax withheld (line 3 as adjusted by line 4 — see instructions)	5	29,865 83
6a	Taxable social security wages (Complete line 7.) $ 216,603.37 × 12.4% (.124) =	6a	26,858 83
b	Taxable social security tips (Complete line 7.) $ 66,620.00 × 12.4% (.124) =	6b	8,260 88
7	Taxable Medicare wages and tips $ 287,705.47 × 2.9% (.029) =	7	8,343 46
8	Total social security and Medicare taxes (add lines 6a, 6b, and 7) ▶	8	43,463 17
9	Adjustment of social security and Medicare taxes (see instructions for required explanation)	9	01 F/U
10	Adjusted total of social security and Medicare taxes (line 8 as adjusted by line 9 — see instructions) ▶	10	43,463 18
11	Backup withholding (see instructions)	11	
12	Adjustment of backup withholding tax for preceding quarters of calendar year	12	
13	Adjusted total of backup withholding (line 11 as adjusted by line 12)	13	
14	Total taxes (add lines 5, 10, and 13)	14	73,329 01
15	Advance earned income credit (EIC) payments made to employees, if any ▶	15	
16	Net taxes (subtract line 15 from line 14). This should equal line IV below (plus line IV of Schedule A (Form 941) if you have treated backup withholding as a separate liability)	16	73,329 01
17	Total deposits for quarter, including overpayment applied from a prior quarter and from your records ▶	17	73,329 01
18	Balance due (subtract line 17 from line 16). This should be less than $500. Pay to Internal Revenue Service ▶	18	
19	Overpayment, if line 17 is more than line 16, enter excess here ▶ $ and check if to be: ☐ Applied to next return OR ☐ Refunded.		

Record of Federal Tax Liability (You must complete if line 16 is $500 or more and Schedule B is not attached.) See instructions before checking these boxes.
If you made deposits using the 95% rule, check here ▶ ☐ If you are a first time 3-banking-day depositor, check here ▶ ☐

DO NOT Show Federal Tax Deposits Here

Show tax liability here, not deposits. The IRS gets deposit data from FTD coupons.

Date wages paid	First month of quarter		Second month of quarter		Third month of quarter	
1st through 3rd	A	2,759.19	I		Q	
4th through 7th	B		J		R	
8th through 11th	C		K		S	9,021.90
12th through 15th	D		L	10,316.38	T	
16th through 19th	E	9,572.94	M		U	
20th through 22nd	F		N		V	
23rd through 25th	G		O		W	12,088.56
26th through the last	H	10,423.78	P	11,346.26	X	
Total liability for month	I	29,755.91	II	22,462.64	III	21,110.46

IV Total for quarter (add lines I, II, and III). This should equal line 16 above ▶ 73,329.01

Sign Here

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete.

Signature ▶

Print Your Name and Title ▶ AGENT IN FACT Date ▶ JAN 31, 19

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TAB M

POWER & COLEMAN
ATTORNEYS AT LAW
COURTHOUSE PLAZA, SUITE 1107
2300 CLARENDON BOULEVARD
ARLINGTON, VIRGINIA 22201

(703) 841-13304721
FAX (703) 841-1822

THOMAS W. POWER
R. LANCE ELLIOTT
JAMES M. COLEMAN
TRACY J. POWER

WASHINGTON, DC OFFICE
4721 MACARTHUR BOULEVARD
WASHINGTON, DC 20007
(202) [Illegible]

March 28, 1996

PRIVILEGED AND CONFIDENTIAL

You have asked whether or not _____ should pay a FICA tax assessment pursuant to a February 16, 1996 Notice and Demand for tip income allegedly reported by ____ employees on Form 4137 and their 1040 income tax filing for the year 1992. You have indicated that you requested and IRS identified the specific employees who reported additional tip income and the amount of such income. You have confirmed that the individual was in fact an employee of ____ and the amount of tips reported was equal to the amount of allocated tips shown on that employee's Form W-2 tax 1992.

In light of the fact that there has apparently been a determination of the amount of additional tip income earned on an individual basis, that the earnings will be credited to the social security benefit of the individual and that the assessment is within the statute of limitations, I believe the taxes are due and should be

paid. Please note that any assessment for additional taxes based upon additional tips earned during 1991 would be outside of the statute assuming all Forms 941 were filed by April 15, 1992. Any additional assessments based upon 1992 tip earnings after April 15, 1996 would similarly be barred.

In my opinion, any future notice allegedly based upon additional employees Form 4137 tip reporting should only be paid after IRS identification of individuals and amounts and similar satisfactory confirmation by the company. Attention should also be paid to the statute of limitations issue.

Please call if you have any questions.

Cordially,

/s/ TRACY J. POWER
TRACY J. POWER

Internal Revenue Service
District Director

Department of the Treasury
310 W. Wisconsin Avenue
Milwaukee, WI 53203

Date: FEB 16 1996

IP

Dear Taxpayer:

The Internal Revenue Service received Form(s) 4137 from your employee(s) showing tip amounts that have not been reported to you. Internal Revenue Code (IRC) section 3121(q) stipulates that the employer is liable for the employer portion of IRC section 3111 FICA tax on such tips.

This letter serves as your notice and demand, in accordance with IRC section 3121(q), for payment of the employer's IRC Section 3111 FICA tax in the amounts of $0.00 on $0 in unreported tips received by your employee(s) during the period January 1, 1991 through December 31, 1991, and $85.60 on $1,119 in unreported tips received by your employee(s) for the period January 1, 1992 through December 31, 1992. The unreported tip amount is the amount shown by your employee(s) on Form 4137.

You should report this tax as an adjustment to FICA taxes on your Form 941 for the calendar quarter in which this notice and demand is made. Please attach a copy of this notice and demand to your Form 941.

To avoid any possible deposit penalty, the tax must be deposited at an authorized bank, using a Federal Tax Deposit Coupon - Form 8109B, within your prescribed

depository rules. If you have a payroll service depositing your payroll taxes, they should be notified of this notice immediately.

If you have any further questions, please call Enrique De Orbeta, Revenue Agent, at 414-297-4144.

Sincerely,

/s/ RICHARD C. [ILLEGIBLE]
ROBERT E. BRASSIL
District Director

TAB N

[Names Omitted]

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

No. C-97-4613-CAL

FIOR D'ITALIA, PLAINTIFF

v.

UNITED STATES AMERICA, DEFENDANT

[Filed: Mar. 8, 1999]
[Entered in Civil Docket: Mar. 15, 1999]

STIPULATION FOR ENTRY OF JUDGMENT AND ORDER THEREON

Pursuant to Court's September 18, 1998 Opinion and Order on Cross Motions for Summary Judgment, the United States of America, by its undersigned counsel, and Fior d'Italia, by its undersigned counsel, stipulate and hereby agree, without prejudice to either party's right to appeal, as follows:

Judgment be entered against the United States of America and in favor of plaintiff Fior d'Italia for the 1994 tax year for form 941 employment taxes in the amount of $18.34 together with interest thereon at the

lawful rate prescribed by 28 U.S.C. § 1961(c)(1) from February 1, 1995 until paid.

ROBERT S. MUELLER, III
United States Attorney

TRACY J. POWER
Attorney For Plaintiff
Fior d' Italia

THOMAS MOORE
Assistant United States Attorney
Tax Division

PURSUANT TO STIPULATION, IT IS SO ORDERED.

Dated: 3/8/99, 1998

CHARLES A. LEGGE
UNITED STATES DISTRICT JUDGE

TAB O

[Names Omitted]

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

No. C-97-4613-CAL

FIOR D'ITALIA, INC., PLAINTIFF

v.

UNITED STATES AMERICA, DEFENDANT

[Filed: May 7, 1999]

NOTICE OF APPEAL

The United States of America hereby appeals to the Ninth Circuit Court of Appeals pursuant to Rule 3, F.R.A.P. from the Judgment, the Order on Motion for Reconsideration, and the Opinion and Order on Cross-Motions for Summary Judgment.

The parties to the Judgment appealed from and the names and addresses of their respective attorneys are as follows:

Party: United States of America

Attorneys: GARY R. ALLEN
Chief, Appellate Section
U.S. Department of Justice
Tax Division
Main Justice Bldg.
10th & Constitution Ave., N.W.
Room 4324
Washington, D.C. 20530
Telephone: (202) 514-3361

ROBERT S. MUELLER, III
United States Attorney
JAY R. WEILL
Assistant United States Attorney
Chief, Tax Division
THOMAS MOORE
Assistant United States Attorney
10th Floor Federal Building
450 Golden gate Avenue, Box 36055
San Francisco, California 94102
Telephone: (415) 436-6935

Party: Fior D'Italia, Inc.

Attorneys: Thomas W. Power
Tracy J. Power
2300 Clarendon Blvd., Suite 1107
Arlington, VA 22201
Telephone: (703) 841-1330

Richard L. Davis
1190 Chestnut Street
Menlo Park, CA 94025
Telephone: (650) 324-0644

ROBERT S. MUELLER, III
United States Attorney

THOMAS MOORE
Assistant United States Attorney
Tax Division

TAB P

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-16021
CT/AG#: CV-97-04613-CAL

FIOR D'ITALIA, INC., PLAINTIFF-COUNTER-DEFENDANT-APPELLEE

v.

UNITED STATES OF AMERICA, DEFENDANT-COUNTER-CLAIMANT-APPELLANT

[May, 30 2001]
[MANDATE ISSUED]

APPEAL FROM the United States District Court for the Northern District of California (San Francisco).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Francisco) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered March 7, 2001

TAB Q

The following two documents were not offered in the district court. They were attached to respondent's appellate brief and were not part of the record in the district court. Petitioner has agreed to include these documents in the Joint Appendix at respondent's request, but does not agree that these documents are part of the record of this case.

CAVEAT: THE FOLLOWING TWO DOCUMENTS WERE NOT OFFERED IN THE DISTRICT COURT. THEY WERE ATTACHED TO RESPONDENT'S APPELLATE BRIEF AND WERE NOT PART OF THE RECORD IN THE DISTRICT COURT. PETITIONER HAS AGREED TO INCLUDE THESE DOCUMENTS IN THE JOINT APPENDIX AT RESPONDENT'S REQUEST, BUT DOES NOT AGREE THAT THESE DOCUMENTS ARE PART OF THE RECORD OF THIS CASE.

[DEC 11, 1996]

MEMORANDUM FOR REGIONAL CHIEF
COMPLIANCE OFFICERS

FROM: Thomas J. Smith
Assistant Commissioner (Examination)
CP:EX

SUBJECT: Impact of Decision in *The Bubble Room, Inc. v. U.S.*, No. 94-616 T (CT. Cl. Oct. 21, 1996)

On October 21, 1996, the United States Court of Federal Claims ruled against the Internal Revenue Service (IRS) in the above cited case. The court stated that the IRS improperly assessed and collected an *employer only* Federal Insurance Contributions Act tax based on an aggregate estimate made by the IRS of tips allegedly received by the employees of The Bubble Room. In ruling against the IRS, the court acknowledged that we are faced with a tremendous amount on unreported tip income within the food service industry. The decision of the court does not

alter the fact that this problem exists and we need to do all we can to address this area of noncompliance. In fact, the court spoke positively of the current IRS Tip Rate Alternative Commitment (TRAC) program as a method to address this area of noncompliance.

This decision dealt with the proper versus improper use of an "audit tool" by the IRS, and has no direct impact on our efforts in the Tip Rate Determination and Education Program. The food service industry recognizes that there is a significant amount of unreported tip income and that the IRS cannot ignore this. We have made excellent progress in getting the industry to recognize the benefits of signing up for TRAC. From June 1995, when TRAC was first released, more than 2,600 TRAC agreements representing more than 16,000 establishments have been secured.

No final decision has been made on the appeal of *The Bubble Room.* Until all issues relative to this court case are resolved, we are issuing interim guidance on how to proceed in dealing with unreported tip income. Our guidance to the field is:

1. We need to improve the compliance level with filing and accuracy of Form 8027;
2. Identify restaurants that are likely candidates for the TRAC/TRDA program;
3. We should be prepared to conduct individual employee audits in appropriate situations; and

REGIONAL CHIEF COMPLIANCE OFFICERS

4. We should modify our position in how we handle tip examinations. We can no longer have employer-only assessments. Any assessments made should be based on amounts from either

Form 4137, *Social Security and Medicare Tax on Unreported Tip Income*, (filed by the employee with the employee's Form 1040) or amounts reflected on Form 885-T, *Adjustment of Social Security Tax on Tip Income Not Reported to Employer*, prepared at the conclusion of an employee tip examination.

We are attaching our summary of *The Bubble Room* decision. A copy of the court has been faxed to each of the Employment Tax Regional analysts. We will continue to share any information on the impact of this court decision. We encourage you to continue to promote the Tip Rate Determination and Education Program and continue in a joint effort to increase compliance in tip reporting.

Attachment

CP:EX:ST/MBeaulieu/rb/622-4386/12-2-96/memo.bbl
Revised: jma/12-10-96

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224
JUNE 16, 1998

[Received: June 24, 1998]

MEMORANDUM FOR REGIONAL CHIEF COMPLIANCE OFFICERS

FROM: Thomas R. Burger
Director, Office of Employment Tax Administration & Compliance

SUBJECT: No Employer-Only Assessments on Unreported Tip Income

In memos issued on December 11, 1996 and September 25, 1997, we sent guidance for you to distribute in the field, regarding employer-only assessments. We wish to emphasize that policy procedures again. Any assessments made against the employer must mirror those first made against the individual employees. Also, any Internal Revenue Code section 3121(q) assessments should be used as a tool to increase compliance and never as a threat.

Assessments made against both the employer and the tipped employee should be based on amounts from either Form 4137, *Social Security and Medicare Tax on Unreported Tip income* (filed by the employee with the employee's Form 1040) or amounts reflected on Form 885-T, *Adjustment of Social Security Tax on Tip Income Not Reported to Employer*, prepared at the conclusion of an employee tip examination.

There is some proposed legislation that would codify the TRAC (Tip Reporting Alternative Commitment) agreement and prevent the IRS from conducting

employer-only assessments. Also, H.R. 2676 of the Restructuring Bill, includes a provision to prohibit the IRS from coercing or threatening taxpayers into signing up for a TRAC agreement. We have also received congressional inquires that employer-only assessments are still being performed by IRS examiners, although our current policy prevents this. Please ensure that all effected IRS personnel working on the Tip Initiative follow the current procedures related to tip examinations. Most important, employees must under no circumstances use or imply the threat of an audit when soliciting participants to sign up for either a TRAC or a TRDA (Tip Rete Determination Agreement).

Please distribute this information to all effected individuals. If you have any questions, please give me a call at (202) 622-2479, or a member of your staff may contact Ida Volz, Program Analyst at (208) 321-2805.

If your management staff or coordinators have any questions, they may contact Regional Analyst Gary Letham at (972) 308-1551.